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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 249.

LIVINGSTON H. McCREA,

Petitioner.

AGAINST

UNITED STATES OF AMERICA, as owner of the S. S. AMERICAN SHIPPER, engines, tackle, apparatus, etc.,

Respondent.

BRIEF OF PETITIONER.

JOHN M. SCOBLE,
Proctor for Petitioner,
Office & P. O. Address,
No. 55 Liberty Street,
Borough of Manhattan,
City of New York.

K. COURTENAY JOHNSTON,
Of Counsel.

LODER APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689

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AGAINST

UNITED STATES OF AMERICA, as owner of the S. S. AMERICAN SHIPPER, engines, tackle, apparatus, etc.,
Respondent.

BRIEF OF PETITIONER.

I.—The Decisions of the Courts Below.

The decision of the United States Circuit Court of Appeals for the Second Circuit was rendered on April 29, 1934 (R., 145-150). It is reported in 70 Fed. (2) 632. On May 7, 1934 the decree of the United States Circuit Court of Appeals, affirming the decree of the District Court, was entered (R., 150).

The decree of the United States District Court for the Southern District of New York, dated August 12, 1932, and entered August 15, 1932, appears on page 109 of the record.

The opinion of Judge Knox of the United States District Court, dated July 26, 1932, appears on pages 102-107 of the record, and is reported in 3 Fed. Sup. 184.

The decree of the United States District Court, dated March 8, 1933, and entered March 9, 1933, appears on pages 115 and 116 of the record.

The opinion of Judge Knox of the United States District Court, dated February 10, 1933, appears on pages 110-115 of the record, and is reported in 3 Fed. Sup. 184, 187.

II.—Jurisdiction.

(1) The date of the decree to be reviewed is May 7, 1934, and will be found on page 150 of the record.

Grounds of This Court's Jurisdiction.

(2) This case involves important questions of maritime law, affecting seamen and shipping interests generally, which frequently arise before both federal and state tribunals, but have not heretofore been definitely decided by this Court (R., 118-124, 134-141, 145-150).

(3) Construction of U. S. Code, Title 46, Sections 596, 673, 685, 741, 742 and 746, and the cognate provisions of the Seamen's Acts of December 21, 1898, March 4, 1915, and March 9, 1920.

(4) Construction of the Fifth Amendment to the Constitution of the United States, particularly that portion thereof which provides that no person shall "be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

III.—Statement of the Case.

A. The Facts.

The S. S. *American Shipper* was owned by the United States (R., 10) and registered in the name of the United States Shipping Board (Respondent's Exhibit B, R., 94a), and was operated as a merchant vessel engaged in the common carriage of goods and passengers by sea for hire. This is admitted by the respondent (R., 4, 8-9; Respondent's Exhibit B, R., 94a). This was also found by the

decision of the United States Circuit Court of Appeals (R., 145). It was also found by the United States Circuit Court of Appeals that the S. S. *American Shipper* was subject to the provisions of Section 2 of the Seamen's Act of March 4, 1915 (46 U. S. C. 673) (R., 145).

On February 15, 1928, the libellant, petitioner herein, signed shipping articles for a voyage on the S. S. *American Shipper* from the Port of New York to the Port of London, Kingdom of Great Britain, and return, at wages of $65 per month (R., 3, 11).

The S. S. *American Shipper* carried on the voyage a crew of ten able seamen, two ordinary seamen, and one additional person who was rated as an able seaman (R., 11, 12, 45, 103). She also carried six firemen, three water tenders and eight oilers (R., 11).

On the voyage from the Port of New York to the Port of London the crew of the vessel S. S. *American Shipper* was not divided into equal watches as required by Section 2 of the Seamen's Act of March 4, 1915 (46 U. S. C. 673). This appears even accepting the testimony offered by the respondent (R., 103).

On arrival at the Port of London the libellant, the petitioner herein, demanded his discharge from the vessel and the payment of his wages earned on the ground of the violation of Section 2 of the Seamen's Act of March 4, 1915 (46 U. S. C. 673). He also demanded one month's additional pay and transportation back to the United States under the provisions of R. S. 4583 (46 U. S. C. 685) (R., 40, 192-193). These demands were refused. *At that time he was not entitled to and did not demand any double wages under the provisions of 46 U. S. C. 596; R. S. 4529.* At the request of the captain, the libellant, petitioner herein, went to the office of the American Consul next morning and made a full statement of the case to him. The Consul stated that even if Section 2 of the Seamen's Act of March 4, 1915 (46 U. S. C. 673) had been violated, he did not think the libellant, petitioner

herein, was so affected by what he, the Consul, considered a "technical violation of the statute," that he was entitled to his discharge, and he refused to have him discharged (R., 77-78, 85-86). The Consul also testified (R., 86):

> "* * * In the third place, I did not consider that the alleged violation of Section 2 of the Seamen's Act of March 4, 1915, was of a nature sufficiently serious to justify the discharge of a member of the crew with arrears of wages, one month's extra wages, and transportation back to the United States * * *."

The libellant returned to the vessel and did his utmost to see the captain, but was unable to do so. He later left the vessel without having been paid any part of the wages due him, and was not even permitted to take his clothes. The vessel sailed for the Port of New York on March 2, 1928. The libellant, petitioner herein, was unable to secure money to pay his transportation back to the United States for three or four weeks. Within a month he returned to the United States (R., 21) and this action was started July 11th, 1928 (R., 1).

B. The Proceedings in the Trial Court.

The action was begun by the libellant, the petitioner herein, on or about July 9, 1928. In his libel he demanded judgment for the wages due him on February 26, 1928, one month's additional wages, the amount of costs incurred in securing transportation back to the United States, the return of his clothes, and also two days pay for each of the days the wages due him were not paid from the time of demand until the time when the same were paid (R., 2-7).

The respondent (R., 8, 9) admitted that the S. S. *American Shipper* was a merchant vessel and carried passengers and merchandise consigned to and shipped by private parties.

The action came on for trial before Judge Knox on May 6, 1932 (R., 10).

On or about July 26, 1932, Judge Knox handed down his decision (R., 102-107). He held that even according to the testimony submitted by the respondent, Section 2 of the Act of March 4, 1915 (46 U. S. C. 673) had been violated, and that the libellant, petitioner herein, was entitled to his discharge and the wages earned at that time (R., 103). He also held that:

> "• • • The right of libellant to his pay, under the Luckenbach decision was so obvious that the delay in making payment of this item since the libel was filed, cannot be said to have come about from a 'sufficient cause,' "

and that the libellant, the petitioner herein, was entitled to two days pay for one from the time of the commencement of the action to the date of the entry of the decree (R., 107).

The Trial Court also held that the libellant, the petitioner herein, was not entitled to one month's additional pay and the cost of transportation back to the United States, as provided for by R. S. 4583 (46 U. S. C. 685), for the reason that the relief, provided for by Section 2 of the Act of March 4, 1915 (46 U. S. C. 673) for the violation of that section, was exclusive (R., 104, 105).

The decree was signed by Judge Knox on Friday, August 12, 1932 (R., 109), and was entered on Monday, August 15, 1932 (R., 109). In a letter dated August 13, 1932 (Saturday), after the decree had been signed, the proctor for the respondent wrote to Judge Knox stating that his attention had been called to two cases which he believed held that the relief, provided for by R. S. 4529 (46 U. S. C. 596), was a penalty, and that it could not be recovered against the United States, and he requested a rehearing of the case (R., 108).

There is absolutely no evidence to show when this letter reached Judge Knox, whether it was before or after

the entry of the decree on Monday, August 15, 1932, or to show that the Clerk of the Court knew anything of it. It appears from the record that the decree must have been sent to the Clerk to be duly entered and that he did so. Nowhere does it appear that the court ever notified the clerk not to enter the decree. There is nothing in the record to show that the Court took any notice of the application for a rehearing until on or about August 30, 1932, when it granted a rehearing of the suit (R., 110).

On or about February 10, 1933, the Court handed down a decision holding that the relief, provided for by R. S. 4529 (46 U. S. C. 596), was a penalty, and that said relief could not be recovered against the respondent (R., 110, 115).

The District Court in its decision did not pass upon the question as to whether or not, even if the relief, provided for by R. S. 4529 (46 U. S. C. 596), were a penalty, the respondent, the United States, had waived any immunity it might have been entitled to as a sovereign by entering into commercial business in competition with private owners, and by and under the Suits in Admiralty Act of March 9, 1920, Chapter 95, Sections 1, 2 and 6 (U. S. Code, Title 46, Sections 741, 742, 746).

The decree was entered on or about March 9, 1933 (R., 115, 116), and an order allowing an appeal from this decree was duly signed and filed May 16, 1933. On that date assignments of error were also duly filed (R., 118, 124). On July 16, 1933, the United States Attorney moved for an order amending the decree filed March 9, 1933, by inserting a clause therein vacating and setting aside the decree entered August 15, 1932 (R., 124, 128). The motion was opposed (R., 128, 131), but was granted. An order amending the decree of March 9, 1933, by inserting a clause therein vacating the decree entered August 15, 1932, was entered on July 18, 1933 (R., 132-133).

On August 10, 1933, an appeal from the amended decree entered July 18, 1933, was allowed in the District

Court, and new assignments of error were filed by the libellant, the petitioner herein, which questioned, in addition to the issues previously raised, the power of the District Court to amend the decree of March 9, 1933, and to vacate the decree of August 15, 1932, by the amended decree of July 18, 1933 (R., 134-141).

C. The Proceedings on the Appeal

The transcript of the record was duly certified by the Clerk of the United States District Court on October 13, 1933. The case was promptly docketed on or about October 13, 1933 (R., 143), without prepayment of costs, by virtue of the provisions of U. S. Code, Title 28, Section 837, under which petitioner now brings his application to this Court. A hearing was thereafter had in the United States Circuit Court of Appeals on February 14, 1934, and a decision was handed down on or about April 29, 1934 (R., 145-150). The decree of the United States Circuit Court of Appeals was entered May 7, 1934 (R., 150).

In its decision the Circuit Court of Appeals, although stating that in a number of cases, including the case of *Vincent* v. *United States* (272 Fed. 889), which had been decided by the Circuit Court of Appeals for the Ninth Circuit, it had been held that the relief of two days pay for one, provided by R. S. 4529 (46 U. S. C. 596), was not a penalty but was compensation or wages, held nevertheless that they would follow the decision in the case of *Missouri Pacific R. R. Co.* v. *Ault* (256 U. S. 554). That case construed a statute of the State of Arkansas and held that the relief provided for by the Arkansas statute was a penalty and that it could not be recovered against the respondent, the United States, which was operating a railroad in the State of Arkansas under a war measure. The Circuit Court of Appeals in the case at bar accordingly held that the relief, provided for by R. S. 4529 (46 U. S. C. 596), was a penalty and not compensation or

wages, and that said relief could not be recovered against the respondent, the United States (R., 148, 149).

The Circuit Court of Appeals also failed or neglected to pass upon the question as to whether or not, even if the relief, provided for by R. S. 4529 (46 U. S. C. 596), were a penalty, the respondent, the United States, had waived any immunity it might have been entitled to as a sovereign by entering into commercial business in competition with private owners, and by and under the Suits in Admiralty Act of March 9, 1920, Chapter 95, Sections 1, 2 and 6 (46 U. S. C. 741, 742, 746).

The District Court held that the libellant, the petitioner herein, could not recover for the additional one month's pay and the cost of transportation back to the United States, although he had been discharged in a foreign country on account of the violation of Section 2 of the Act of March 4, 1915, Chapter 155 (46 U. S. C. 673) by the respondent, the United States, for the reason that the relief, provided for by Section 2 of the Act of March 4, 1915 (46 U. S. C. 673), was exclusive (R., 104, 105). The Circuit Court of Appeals did not in any way whatsoever pass upon the question of whether or not the relief under Section 673 were exclusive, but held that the libellant, petitioner herein, was not entitled to the relief provided by R. S. 4583 (46 U. S. C. 685), and based its decision upon the fact that the libellant, petitioner herein, had not been discharged by the American Consul at London. Whether by inference it might be said that the Circuit Court of Appeals decision meant or implied that the relief, provided for by Section 2 of the Act of March 4, 1915 (46 U. S. C. 673), is not exclusive, and that if the petitioner herein had been discharged by the American Consul, or if his discharge by the Master had been approved by the Consul, he would have been entitled to the relief, provided for by R. S. 4583 (46 U. S. C. 685), does not appear.

The Circuit Court of Appeals also held that when the libellant, the petitioner herein, left his vessel in London, without being discharged by the American Consul, he "deserted his ship" (R., 149), although it had been held by the District Court that he was entitled to his discharge, to leave his ship, and to receive the wages earned (R., 103). It had also been held by the United States Supreme Court that under those conditions he was not a deserter and was entitled to his discharge and to receive the wages earned and could bring an action therefor. *O'Hara* v. *Luckenbach Steamship Co.* (269 U. S. 364).

The Circuit Court of Appeals also stated in its opinion (R., 216):

> "This libellant had made himself somewhat familiar with the provisions of the Seamen's Act before signing on and also with the decision of the Supreme Court in *O'Hara* v. *Luckenbach S. S. Co.*, 269 U. S. 364. One of his reasons for becoming a member of the crew of this ship was to take advantage of any violation of the law."

These are not the facts. There is absolutely nothing in the record which supports this statement. The United States Supreme Court in the case of *O'Hara* v. *Luckenbach S. S. Co.* (*supra*), had recently construed Section 2 of the Act of March 4, 1915 (46 U. S. C. 673). This decision was of the utmost importance to seamen and was discussed in the *Seamen's Journal*, where it had been read by the libellant (R., 20).

The appellate court is controlled in its decisions by facts shown by the record, and statements of other facts, either in the parties' briefs or on the argument, or otherwise, may not properly be received or considered.

Leonard v. *Fields*, 71 Fed. (2d) 483.

No assignments of error were taken or filed and no appeal was taken from the decisions and judgments of the

District Court by the respondent (R., 148), and no petition for a writ of certiorari was filed by it in the United States Supreme Court.

A petition for a writ of certiorari was duly filed on behalf of the petitioner herein. It was allowed and an order to that effect was entered in the office of the clerk of this Court on the eighth day of October 1934.

IV.—Specification of Errors.

The errors assigned and intended to be urged are as follows:

(1) The denial of the right of the petitioner, an unpaid seaman, to a judgment or decree *in personam* for the statutory double wages, the relief provided by U. S. Code, Title 46, Section 596, incurred by reason of the refusal and neglect of the respondent, the United States, to pay petitioner the wages claimed by him in his libel and found to be due on account of the violation of U. S. Code, Title 46, Section 673, by the respondent, the United States, on the ground that said double wages provided for by said U. S. Code, Title 46, Section 596, did not constitute compensation or wages, but constituted a penalty, and could not be recovered against the respondent, the United States; (Assignments of Error Nos. 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 39 (R., 120-122, 124); Assignments of Error Nos. 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 39, R., 136-140); and on the ground that the said respondent, the United States, did not divest itself of all sovereign character and waive immunity by entering into commercial business in competition with private owners and by and under the Suits in Admiralty Act of March 9, 1920, Chapter 95, Sections 1, 2, 6 (46 U. S. C. 741, 742, 746) (Assignments of Error Nos. 30, 31, 32, 33, 34, 35, 36, 37, R., 122-124; Assignments of Error Nos. 30, 31, 32, 33, 34, 35, 36, 37, R., 138-140).

(2) The denial of the right of the petitioner, an unpaid seaman discharged in a foreign country, to a judgment or decree *in personam* against the respondent, the United States, for one month's pay and the cost of transportation back to the United States, as provided for in U. S. Code, Title 46, Section 685 (R. S. 4583), in addition to his discharge and wages earned under Section 2 of the Act of March 4, 1915 (46 U. S. C. 673), on the ground that said relief provided for by Section 2 of the Act of March 4, 1915 (46 U. S. C. 673) was exclusive (Assignments of Error Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 39 (R., 118-120, 124); Assignments of Error Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 39 (R., 134-136, 140).)

(3) The denial of the right of the petitioner, an unpaid seaman discharged in a foreign country by reason of the violation by the respondent of U. S. Code, Title 46, Section 673, to a judgment or decree *in personam* against the respondent, the United States, for one month's pay and the cost of transportation back to the United States, as provided for in U. S. Code, Title 46, Section 685 (R. S. 4583), in addition to his discharge and wages earned under Section 2 of the Act of March 4, 1915 (46 U. S. C. 673), on the ground that the petitioner was not discharged by the United States Consul at London, Kingdom of Great Britain, and that said petitioner was a deserter (R., 149, 150).

(4) Whether it was proper for the United States Circuit Court of Appeals to hold that the action of the District Court, in allowing a reargument of the case on the ground that the relief, provided for by U. S. Code, Title 46, Section 596, was a penalty and that the respondent, the United States, could not be held for a penalty, was correct, in view of the fact that the respondent, the United States, had not pleaded that the relief, provided for by U. S. Code, Title 46, Section 596, was a penalty

and that said respondent, the United States, had made no motion to amend its pleadings. (Assignments of Error 38, R., 124, Decision C. C. A., R., 145-150, 140, Assignments of Error, R., 38, 145-150).

(5) The findings of the United States Circuit Court of Appeals that the entry of the judgment or decree of August 15, 1932 was irregular, and that said decree was vacated and set aside by a granting of a rehearing after the entry of the said judgment or decree of August 15, 1932 (Assignments of Error Nos. 40, 41, 42, 43, R., 140, 141, Decision C. C. A., 147, 148).

V.—Argument.

POINT I.

Section 2 of the Act of March 4, 1915, was violated, and the libellant was entitled to his discharge and to his wages earned; and his wages earned were withheld without "sufficient cause."

Section 2 of the Seaman's Act provides as follows:

> "*Requirements as to watches; duties of seamen; right to discharge.*—In all merchant vessels of the United States of more than one hundred tons gross, excepting those navigating rivers, harbors, bays, or sounds exclusively, the sailors shall, while at sea, be divided into at least two, and the firemen, oilers, and water tenders into at least three watches, which shall be kept on duty successively for the performance of ordinary work incident to the sailing and management of the vessel. The seamen shall not be shipped to work alternately in the fireroom and on deck, nor shall those shipped for deck duty be required to work in the fireroom, or vice versa; but these provisions shall not limit either the authority of the master or other officer or the obedience of the seamen when, in the judgment of the master or other officer, the whole or

> any part of the crew are needed for the maneuvering of the vessel or the performance of work necessary for the safety of the vessel or her cargo, or for the saving of life aboard other vessels in jeopardy, or when in port or at sea from requiring the whole or any part of the crew to participate in the performance of fire, lifeboat, and other drills. While such vessel is in a safe harbor no seaman shall be required to do any unnecessary work on Sundays or the following-named days: New Year's Day, the Fourth of July, Labor Day, Thanksgiving Day, and Christmas Day, but this shall not prevent the dispatch of a vessel on regular schedule or when ready to proceed on her voyage. And at all times while such vessel is in a safe harbor, nine hours inclusive of the anchor watch, shall constitute a day's work. Whenever the master of any vessel shall fail to comply with this section, the seaman shall be entitled to discharge from such vessel and to receive the wages earned. But this section shall not apply to fishing or whaling vessels or yachts."

The trial court found that, according to the testimony of the respondent's own witness (Captain Cummings, R., 38-52), Section 2 of the Act of March 4, 1915 (c. 153, sec. 2, 38 Stat. 1164; 46 U. S. C. 673) known as the Seaman's Act, had been violated, and that the libellant was entitled to his discharge when the vessel reached London, and to the wages earned (R., 103); and that the purpose of the statute "was to promote safety at sea rather than to regulate the working conditions of the men" (R., 103). It also found that the libellant was entitled to two days' pay for one, from the time the action was begun (R., 107) to the entry of the decree. It also found that:

> "• • • The right of libellant to his pay, under the Luckenbach decision was so obvious that the delay in making payment of this item since the libel was filed, cannot be said to have come about from 'a sufficient cause'" (R., 107).

The Trial Court also found that the fact that the vessel carried a larger crew than required by the certificate of inspection did not relieve the ship from compliance with the statute (R., 103).

> *Southern Pacific S. S. Co.* v. *Hair, et al.*, 24 Fed. (2) 94.

The District Court, in its opinion dated February 10, 1933 (R., 110-115), did not in any way change or modify these findings. The respondent took no appeal from these findings. In fact, it took no appeal whatsoever, and said findings were not questioned in the decision of the Circuit Court of Appeals (R., 145-150).

In the case at bar, the Circuit Court of Appeals, referring to the S. S. *American Shipper*, found (R., 145):

> "• • • It was owned by the United States and was a merchant vessel subject to the provisions of Sec. 2 of the Seamen's Act of March 4, 1915 (46 U. S. C. Sec. 673) relating to watches; their duties; and their right to discharge.
>
> "There were thirteen seamen on the vessel and they were not, while at sea, divided as equally as that number permitted into watches and kept on duty successively as the above statute required. Instead of this, there were three watches of three men each and the remaining four were kept on day duty and not included in any watch."

In the case of *O'Hara* v. *Luckenbach S. S. Co.* (269 U. S. 354), the libellants first asked for their discharge without assigning any reason. They were refused. They then applied for discharge on account of disability and were refused. They then claimed discharge on the ground of the violation of Section 2 of the Seamen's Act of March 4, 1915, C. 153, 38 Stat. 1164; (46 U. S. C. 673), and were refused. The libellants then left the vessel and later brought an action for wages earned. The defense was that the libellants deserted the vessel (*O'Hara* v.

Luckenbach S. S. Co., 1 Fed. (2) 923). The United States Supreme Court held that they had not deserted their vessel and were entitled to their discharge and wages earned. In its opinion (*O'Hara* v. *Luckenbach S. S. Co.*, 269 U. S. 364, 367) the court said:

> "• • • The general purpose of the Seaman's Act is not only to safeguard the welfare of the seamen as workmen, but, as set forth in the title, also to promote safety at sea.'"
> "• • • And not only is the division confined to those of the crew engaged in the mechanics of conducting the ship on her voyage, but the imperative requirement is that the watches into which they are divided 'shall be kept on duty successively,' that is to say by turns, so that one watch must come on as another goes off. The evident purpose was to compel a division of the men for duty on deck and in the fireroom and continuity of service, to the end that in those departments the ship should *at all times* be actively manned with equal efficiency."

And (p. 368):

> "• • • *But the provision, fundamentally, is a measure of precaution against those perilous and often unexpected emergencies of the sea when only immediate and wakeful readiness for action may avert disaster or determine the issue between life and death;* its effect as a regulator of working conditions is a matter of subordinate intent." (Italics ours.)

Strathearn v. *Dillon*, 256 Fed. 631; 252 U. S. 348; *Thompson, etc.* v. *Lucas, et al.*, 252 U. S. 358.

The case of *O'Hara* v. *Luckenbach S. S. Co.* (269 U. S. 364) clearly sets out the reason and necessity for safety laws at sea, including Section 2 of the Seamen's Act. The court said (p. 368):

> "But it is apparent from the hearings and debates, that Congress looked forward to disasters like those of the *Titanic* and the *Volturno* (the facts of

> which had been submitted to inquiry by its committees), where, in the one, the lack of lifeboats, probably caused the loss of many lives, although in a quiet sea, and where in the other, lifeboats lowered in a great storm were engulfed, it was thought by some, from the absence of the skill of able seamen in launching them, or like that of the *Rio de Janeiro* (*In re Pacific Mail S. S. Co.*, 130 Fed. 76; 64 C. C. A. 410; 69 L. R. A. 71), which sank with many of its lifeboats unlaunched because the crew of Chinese sailors were unable to understand the language in which the orders of their officers were given."

The need for these safety laws at sea and for their strict enforcement clearly appears from the recent appalling catastrophe of the *Morro Castle*. Among the charges preferred by the Board of Inquiry of the United States Steamboat Inspection Service against Acting Captain Warms and others was the charge:

> "5. That you failed to have your deck crew divided into equal watches as required by the Seamen's Act, and thereby reducing the number of men on watch at the time the fire was reported, thus unduly jeopardizing the lives of the passengers and crew."

According to the reports in the newspapers the report of the said Board of Inquiry said:

> "• • • • that the required deck crew, consisting of 15 able seamen, seven ordinary seamen, three quartermasters and three deck watchmen, were not divided into equal watches and that only the three quartermasters, three watchmen, three able seamen and three ordinary seamen were standing watches. The balance of the crew were assigned to day work, thereby reducing the number of men on watch considerably at the time the fire was reported."

In the case at bar the trial court found as a question of fact that the respondent violated Section 2 of the Sea-

men's Act (46 U. S. C. 673); that the petitioner was entitled to his discharge (R., 103), and that there was not sufficient cause for the withholding of his wages (R., 107). These findings were approved by the Circuit Court of Appeals (R., 145). The respondent did not question this portion of the decision of the trial court, and did not appeal therefrom. In fact, the respondent did not take any appeal whatsoever from any of the decrees entered herein (R., 148).

The petition herein by the petitioner for a writ of certiorari was granted by this court. No petition for a writ of certiorari was filed by the respondent and none was granted. This court should not allow the respondent to raise any questions as to which there have been concurrent findings in favor of the petitioner by both the District Court and the Circuit Court of Appeals and from which no appeal has been taken.

Lloyd v. *Elting*, 287 U. S. 329;
The Carib Prince, 170 U. S. 655, 658;
Spencer, Kellogg & Son v. *Hicks*, 285 U. S. 502, 510.

POINT II.

The relief, provided for under the Seamen's Act of March 4, 1915, Chapter 153, Section 3, R. S. 4529 (46 U. S. C. 596), is compensation or wages and not a penalty.

In the case at bar it was found by the trial court that:

> "• • • • The right of libellant to his pay, under the Luckenbach decision was so obvious that the delay in making payment of this item since the libel was filed, cannot be said to have come about from 'a sufficient cause'" (R., 107).

That the wages due the libellant at the time of his discharge were withheld without "sufficient cause" or with-

out reasonable cause is clear, and he is entitled to double wages from the time the *American Shipper* cleared, March 2, 1928, or from the date of the bringing of this action. In *Southern Pac. S. S. Co.* v. *Hair, et al.* (24 Fed. (2d) 94), it is said (p. 95):

> "Under Section 3 of that act the master's failure, without sufficient cause, to pay such wages, had the effect of entitling the appellees to a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods which sum shall be recoverable as wages in any claim before the court."

O'Hara v. *Luckenbach S. S. Co.*, 269 U. S. 364;
Southern Pacific Co. v. *Hair, et al.*, 24 Fed. (2d) 94;
El Ostero, 14 Fed. (2d) 349;
Strathearn S. S. Co. v. *Dillon*, 256 Fed. 631; 252 U. S. 348.
Thompson, etc. v. *Lucas, et al.*, 252 U. S. 358.

The respondent does not appear to claim that the wages due the libellant at the time he asked for his discharge were refused with "sufficient cause" or "reasonable cause." It apparently admits that, had the respondent been any one other than the United States or some other sovereign state, the libellant would be entitled to recover under R. S. 4529. It is argued, however, that no recovery can be had against the United States, for the reason that the relief provided in R. S. 4529 is a penalty, and that no recovery can be had against the United States for a penalty.

The relief of two days' pay for one, provided for under R. S. 4529 (46 U. S. C. 596), is compensation or wages and not a penalty.

The decision of the District Court and that of the Circuit Court of Appeals that said relief was a penalty is in conflict with the Fifth Amendment to the Constitution of

the United States, with the statute itself, with the decisions of this Court, and with the decisions of the United States Circuit Court of Appeals for the Ninth Circuit, the United States District Court for the districts of Maryland and South Carolina, as well as the courts of last resort in New York and Massachusetts.

R. S. 4529, Act of March 4, 1915, Chapter 153, Section 3 (46 U. S. C. 596) provides:

> "*Time for payment.* The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage."

The Circuit Court of Appeals in its decision admits that the relief, provided for in the statute in question (R. S. 4529; 46 U. S. C. 596), has been held to be compensation or wages, and judgment granted and entered, in an action against the United States (*Vincent* v. *United States*, 272 Fed. 889), and that in a number of other cases, where the question has been raised as to whether

or not the relief is a penalty, it has been decided that it was compensation or wages and not a penalty (R., 148). No reported case had held such relief to be a penalty, except for dicta in a District Court case, *Corrigan* v. *United States* (293 Fed. 610).

Congress has expressly said that the compensation provided for by R. S. 4529 shall be "*recoverable as wages.*" It is part of the contract between and entered into by the seamen and the United States as the ship owner.

All the statutes providing for the relief of a seaman become and are a part of the contract with him when he signs shipping articles. This clearly makes the relief provided by the statutes a contractual liability and not a penalty.

> *Covert* v. *British Brig Wexford*, 3 Fed. 577, 578;
> *Cox* v. *Lykes Bros.*, 237 N. Y. 376, 381;
> *The Steel Trader*, 275 U. S. 388, 391.

In the case of *Vincent* v. *United States* (272 Fed. 889), judgment was allowed against the respondent, the United States (who is the respondent in this case), for the relief provided for in the statute R. S. 4529 (46 U. S. C. 596). The *Vincent* case was decided by the United States Circuit Court of Appeals for the Ninth Circuit. The Circuit Court of Appeals in its opinion in the present case states that in the *Vincent* case the question of whether or not the relief, provided for under said statute, was compensation or wages, was not discussed. It must be presumed, however, that in considering the *Vincent* case the Court had in mind all questions of facts and law involved and considered the same.

> *United States* v. *Texas*, 143 U. S. 621, 642;
> *Danks* v. *Gordon*, 272 Fed. 821, 823.

Not only in this, but in subsequent cases before the same Court, the United States Circuit Court of Appeals

for the Ninth Circuit, it was held that the relief provided for in said statute did not constitute a penalty but was for compensation or wages earned.

In *Gerber* v. *Spencer* (278 Fed. 886), the court said:

> "We adopt the clear statement by Judge Choate in *Covert* v. *British Brig Wexford* (D. C.), 3 Fed. 577, 578, 'These statutes are designed for the protection of seamen, to prevent the abuse of withholding their pay, and thereby keeping them in port at expense and out of employment while waiting for a settlement. It is a liquidated indemnity, relief for such enforced expense and delay.'"

In the case of *Buckley* v. *Oceanic Steamship Co.* (5 Fed. (2) 545, C. C. A., 9th Circuit), the same court and two of the same judges, who had decided the *Vincent* case, the opinion of Hunt, *J.*, being concurred in by Gilbert and Rudkin, *JJ.*, said (p. 546):

> "• • • The nature of the statute (R. S. 4529), whether it is remedial or penal, has been considered *by this and other courts*, which have held that sums recoverable under its provisions are treated as wages—compensation to seamen, rather than the punishment of the master. *Gerber* v. *Spencer* (C. C. A.) 278 Fed. 886; *Cox* v. *Lykes Bros.*, 237 N. Y. 376, 143 N. E. 226." (Italics ours.)

And also (p. 546):

> "In as much as the claim for the two days' pay under Sec. 4529, *supra*, is for extra wages as incidental to the wages proper, it stands upon no different basis than does the claim for wages proper"

It has also been held in a number of other cases that the relief provides for compensation or wages and not for a penalty.

The Fort Gaines, 18 Fed. (2) 413;
The Chester, 25 Fed. (2) 908;
The Trader, 17 Fed. (2) 623.

This Court, in the case of *Collie, et al.* v. *Fergusson, et al.* (281 U. S. 52), said (p. 54):

> "The claim for double wages which, when valid, is by the terms of the statute '*recoverable as wages,*' has been held to be embraced in the seaman's lien for wages with priority over other liens, and governed by the procedure applicable to suits for the recovery of seamen's wages * * *." Citing cases. (Italics ours.)

Throughout the opinion in the *Collie* case, Mr. Justice Stone refers to the relief provided by the statute as "a liability." It was denied the libellant on the ground that the failure to pay the wages was with "sufficient cause" and so was justified. In the case at bar, it has been held both by the District Court and by the Circuit Court of Appeals that the failure to pay the wages was "without sufficient cause."

The same question came before the Court of Appeals of the State of New York in the case of *Cox* v. *Lykes Bros.*, defendant, and *United States Shipping Board Emergency Fleet Corp.*, defendant-respondent (237 N. Y. 376).

The complaint against the defendant Lykes Brothers had been dismissed (204 A. D. 442), and the defendant *United States Shipping Board Emergency Fleet Corporation was the sole respondent* in the Court of Appeals. The opinion therein was written by Mr. Justice Cardozo. As was stated in said opinion, the vessel in question was registered in the name of the United States of America and was operated by the United States Shipping Board Emergency Fleet Corporation through Lykes Brothers as agents. The question raised on this appeal was whether or not R. S. 4529 (46 U. S. C. 596) provided for compensation or wages, or for a penalty, and whether an action therefor could be brought in a state court. The Court held that it provided for wages or compensation

and did not provide for a penalty. The Court said (p. 379):

> "The Appellate Division found the present suit to be one for a penalty or forfeiture within the meaning of this statute. We do not so regard it. Congress has expressly said that the extra compensation, when due, 'shall be recoverable as wages.' This would seem decisive, without more, that in determining the bounds of jurisdiction, it is not to be classified as a penalty. There was no thought that the state courts, which have undoubted jurisdiction to give judgment for wages in the strict sense, should be shorn of jurisdiction to give judgment for the statutory incidents. This conclusion is fortified when we search for the purpose of the statute. The purpose, or at least the predominant one, was not punishment of the master or owner, but compensation to the seaman. Delay means loss of opportunity to ship upon another vessel. It means hardship during the term of waiting, the sufferer, often improvident, and stranded far from home. 'In all fairness he should recover more than the amount due him for wages earned' (*Calvin* v. *Huntley*, 178 Mass. 29, 32). How much this extra amount should be would be often a troublesome question, if it were left open in every case. *'Hence it might be deemed advisable to have this indefinite element made definite by a general law with reference to which the parties may conclusively be presumed to have contracted, and which, therefore, should be taken to be the law of the contract'* (*Calvin* v. *Huntley, supra; Gerber* v. *Spencer*, 278 Fed. Rep. 887; *Covert* v. *British Brig Wexford*, 3 Fed. Rep. 577, 578, 579). The case cited from Massachusetts is authority for the ruling that an action for extra wages under section 4527 of the United States Revised Statutes, which does not differ in essentials from section 4529, may be maintained in the state courts and is not an action for a penalty * * *." (Italics ours.)

The same construction of a similar statute, R. S. 4527 (46 U. S. C. 594), was given in the case of *Calvin* v.

Huntley (178 Mass. 29, 32), in which decision Mr. Justice Holmes, later a member of this Court, concurred.

An action for extra wages, under R. S. 4527 (46 U. S. C. 594), does not differ in essentials from R. S. 4529 (46 U. S. C. 596). *Cox* v. *Lykes Bros.* (237 N. Y. 376, 379). R. S. 4527 (46 U. S. C. 594) provides:

> "Right to wages in case of improper discharge.—Any seaman who has signed an agreement and is afterward discharged before the commencement of the voyage or before one month's wages are earned, without fault on his part justifying such discharge, and without his consent, shall be entitled to receive from the master or owner, in addition to any wages he may have earned, a sum equal in amount to one month's wages as compensation, and may, on adducing evidence satisfactory to the court hearing the case, of having been improperly discharged, recover such compensation as if it were wages duly earned."

In the case of *United States Steel Products Co.* v. *Adams* (*The Steel Trader*, 275 U. S. 388), which was brought under R. S. 4527, it was said (p. 391):

> "The word compensation, in Sec. 4527, distinctly indicates that payment of a sum equal to one month's wages was intended to constitute the remedy for invasion of the seaman's rights through breach of his contract of employment in the circumstances specified. 'Damages consist in compensation for loss sustained * * * By the general system of our law, for every invasion of right there is a remedy, and *that remedy is compensation.* This compensation is furnished in the damages which are awarded.' Sedgwick's Damages, 9th Edition, Vol. I, p. 24. See also *Bauman* v. *Ross*, 167 U. S. 548. The provision that such sum may be recovered 'as if it were wages duly earned' permits the seaman to enforce payment by the special and summary methods provided for collecting his ordinary wages.
>
> "In *Calvin* v. *Huntley* (1901) 178 Mass. 29, 32, we think the Supreme Court of Massachusetts

properly interpreted Sec. 4527, and in respect of it rightly said:

> "'It speaks not of punishment but of compensation, its object is to protect the seaman from loss rather than to punish the master for discharging him. *The remedy is given to the seaman alone, and its plain purpose is to furnish a clear and well defined rule of damages as between him and the master for a breach of contract in which the seaman and the master or owner are the only persons interested* * * * Nor does the rule of damages seem unreasonable. The shipping contract calls upon the seaman to go to various places, sometimes far from home, and it may be, for instance as in this case was the actual fact, that he may be discharged in a port distant from that where he signed the articles, or where he can not immediately secure any other employment on board ship or elsewhere, and that in all fairness he should recover more than the amount due him for wages earned. Hence it might be deemed advisable to have this indefinite element made definite by a general law with reference to which the parties may conclusively be presumed to have contracted, and which therefore should be taken to be the law of the contract. *The object of the statute is not to punish but to provide a reasonable rule of compensation for a breach of contract.* We think the statute not penal but remedial * * *.'" (Italics ours.)

As was said in *Calvin* v. *Huntley* (178 Mass. 291 at p. 31):

> "It is to be observed that the language of the section is not that ordinarily used in a penal statute. Neither the word 'penalty' nor 'forfeiture' is in it. Moreover it does not provide punishment for the commission of a criminal offense nor for the neglect of a statutory duty, nor even for the neglect of a duty in the performance of which the public as such may be supposed to have an interest."

In practically all cases, where the question of the construction of R. S. 4529 (46 U. S. C. 596) or R. S. 4527 (46 U. S. C. 594), has come in question in actions pending in the federal courts and courts of various states, it has been held that the relief provided for in said sections constituted compensation or wages and not a penalty and was part of the contract.

In all cases where the relief under these statutes has been refused it has been on the ground that the failure or refusal to pay the wages due was with "sufficient cause."

The Circuit Court of Appeals in its opinion (R., 148) admits that in the cases in which the question has been raised of whether or not the relief, provided for by R. S. 4529 (46 U. S. C. 596), is a penalty, or wages or compensation, it has been held that it is wages or compensation and not a penalty.

The Trial Court and the Circuit Court of Appeals base their opinions that the relief, provided for by said statute, is a penalty and not wages or compensation, on the case of *Missouri Pacific R. R. Co.* v. *Ault* (256 U. S. 554). That case involved the construction of a statute of the State of Arkansas, which stated specifically that the relief was a penalty, and also involved what is known as the Federal Control Act.

In the *Ault* case (*supra*), the President had taken possession of the Missouri Pacific Railroad pursuant to the Proclamation of December 26, 1917 (40 Stat. 1733), under the Act of August 29, 1916 (C. 418, 39 Stat. 619, 645). In the last named statute (39 Stat. 645), it was provided:

> "The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and *to utilize* the same, *to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equip-*

> *ment*, or for such other purposes connected with the emergency as may be needful or desirable." (Italics ours.)

In said case the Court said (p. 559):

> "The courts were to go on entertaining suits and entering judgments under existing law, but the property in the hands of the President *for war purposes* was not to be disturbed." (Italics ours.)

The railroad was being operated as a *war measure* under the said act (39 Stat. 645) *for the transportation and transfer of troops, war material and such other purposes as might be connected with the emergency as might be useful and desirable, to the exclusion of other traffic* which authority was confirmed by the Federal Control Act of March 21, 1918 (C. 28; 40 Stat. 1763). As is said in the *Ault* case (p. 559):

> "• • • but the property in the hands of the President *for war purposes* was not to be disturbed." (Italics ours.)

In the case at bar, *McCrea* v. *United States*, the government was operating the merchant vessel, S. S. *American Shipper* in competition with private owners, and under the provisions of the Suits in Admiralty Act.

Judge Cardozo clearly distinguished the statute involved in the *Ault* case, and R. S. 4529 (46 U. S. C. 596), in his opinion in *Cox* v. *Lykes Bros., et al.* (237 N. Y. 376), saying (p. 380):

> "We are to remember that the same provision may be penal as to the offender and remedial as to the sufferer • • • The nature of the problem will determine whether we are to take one viewpoint or the other. *From the viewpoint of the government (in the Ault case) the court found this provision predominantly penal as well it might, not only because the statute (of Arkansas) so declared, but also because of the differing situation*

> *of seamen on the one hand and railroad workers on the other. Here (referring to the Cox. v. Lykes case), Congress imposing a liability for the benefit of seamen, has put it on the same plane as a liability for wages, and has said that the two shall be enforcible together.*" (Italics and words in parentheses ours.)

It will be noted that in the case of *Cox* v. *Lykes Bros.* (*supra*), the defendant involved was not a private corporation, as stated by the District Court in the case at bar (R., 113). In the *Cox* case the complaint against the defendant Lykes Brothers, a private corporation, had been dismissed in the trial court (*Cox* v. *Lykes Bros., et al.*, 204 A. D. 442). The sole respondent on the appeal was the United States Shipping Board Emergency Fleet Corp. (*Cox* v. *Lykes Bros. & U. S. Shipping Board Emergency Fleet Corp.*, 237 N. Y. 376).

The Circuit Court of Appeals (9th Circuit), in a long line of decisions, clearly sets out the distinction between the situation where the United States is engaged in private business (as in the *McCrea* case, and in the cases just cited), and that where it is engaged in a governmental capacity as a war measure (as in *Missouri Pacific R. R. Co.* v. *Ault, supra*). In the case of *Ballaine* v. *Alaska Northern Ry. Co.* (259 Fed. 183) it said (p. 185):

> "The act of March 12, 1914, ch. 37, heretofore cited, which authorizes the President to locate, construct and operate railroads in Alaska, expressly provides that the Alaska Railroad is *for the settlement of public lands and the transportation of coal for the Army and Navy, for the transportation of troops, arms, munitions of war, the mails, and for other governmental and public uses,* and to transport passengers and property. The act (Section 21) also confers authority upon the President, through such agents as he may appoint or employ, to do all necessary acts, in addition to those specially authorized, to enable him to accomplish the purposes of the Act • • • Taking all these provisions together they plainly show, that the United

> States * * * acted in its sovereign capacity, and in exercising entire control, possession, ownership and management, has merely employed the corporate organization as an agency through which to exercise the purposes of the statute." (Italics ours.)

The court clearly based its decision upon the fact that the government was acting in its sovereign capacity. It is admitted in said decision that if the government had been engaged in a commercial business the rule would have been different.

Referring to the case of *Salas* v. *United States* (234 Fed. 842), which was similar to the case at bar, the court said (p. 185):

> "The Court of Appeals (in the *Salas* case) was of the opinion that the United States had entered into commercial business in the premises and was to be treated like any other corporation * * *."

It thus clearly appears that in its decision in the case of *Vincent* v. *United States* (272 Fed. 889), the Circuit Court of Appeals (9th Circuit) had in mind the fact that the respondent therein was the United States and that the relief, provided for by the statute involved herein, R. S. 4529, Act of March 4, 1915, C. 153, Sec. 3 (46 U. S. C. 596), was not a penalty and could be recovered against the United States. Especially does this appear in the decisions by the same court of:

> *Gerber* v. *Spencer, et al.*, 278 Fed. 886;
> *Buckley* v. *Oceanic S. S. Co.*, 5 Fed. (2) 545.

In the case of *Salas* v. *United States* (234 Fed. 842, C. C. A., 2d Circuit), Salas was charged with conspiracy to defraud the United States. The Panama Railroad Co. was a New York corporation, and was an agency of the United States, all the stock being held by the United

States, and was operated by the War Department. It is said (p. 844):

> "When the United States enters into commercial business it abandons its sovereign capacity and is to be treated like any other corporation. *Bank of United States* v. *Planters Bank*, 9 Wheat. 904, 6 L. Ed. 244. Although it absolutely owns the Panama Railroad Company and is the only person profiting or losing by its activities, still the Railroad Company sues and is sued just like any other corporation, in its own name."

In its decision herein the Circuit Court of Appeals said (R., 149):

> "• • • The wages earned and due the appellant when he demanded his discharge and his pay on February 26, 1928 amounted to $28.95 and he now claims in addition to that with interest, because of the double wage provision of the statute, about $7,000.00. Obviously such a sum cannot be merely just compensation for delay in paying the wages earned and we feel bound by the decision in the *Ault* case to take a view contrary to that which prevailed in the other cases cited in so far as they may be authority for holding that the United States is subject to the double wage provision of the Seamen's Act (46 U. S. C. A. 596) • • •."

The Circuit Court of Appeals appears to take the position that if the delay in paying the wages had been for only a few days, it might be considered as wages, but the fact that the respondent arbitrarily refused to pay the wages due shows that the said relief must be a penalty.

It clearly appears from the record that any delay in bringing this case to trial was occasioned by the respondent, and that the libellant was not in any way responsible for it and could not in any way have expedited it.

The libel was filed on or about July 11, 1928 (R., 1). The answer of the respondent was filed on or about August 6, 1928 (R., 1).

There were no depositions of any kind taken by or on behalf of the libellant. The depositions of Daniel Miller and Lowell C. Pinkerton, taken on behalf of the respondent, were not taken and filed until May 6, 1929 (R., 1). The deposition of Ian S. MacHardy, taken on behalf of the respondent, was not taken until November 19, 1931 (R., 64). The deposition of Paul C. Neilsen, taken on behalf of the respondent, was not taken until November 2, 1931 (R., 52, 53), while the deposition of Schuyler F. Cumings, captain of S. S. *American Shipper* at the time referred to herein, taken on behalf of the respondent, was taken on or about February 3, 1932 (R., 38). The action came on for trial on May 6, 1932, as soon as it was possible after the respondent had taken its depositions.

In the case of *The Lake Galewood* (21 Fed. (2) 987), a check tendered the seaman had on it "in full settlement." The seaman refused to accept it and later brought an action for his wages and two days' pay for one from the time the pay was due. The court, referring to the large amount of the additional pay of two days' pay for one, said (p. 989):

> "The court therefore, finds that the libellant was entitled to be paid unconditionally on May 1, 1927, and that, since the money was not so tendered at that time, libellant is entitled, under the statute, to an additional sum equal to two days' pay for each and every day from May 1st to the date of the original decree in this case. Such penalty seems disproportionate, but there seems to be no escape, under the language of the statute and the decision in the *Whittemore* case."

The libellant could not have secured a preference or brought the action on for trial prior to the date it was tried. The action was commenced July 11, 1928, a very short time after the libellant was able to secure passage back to the United States, after having been left stranded penniless in England through the act of the respondent.

At the time of the commencement of this action by the libellant there were only three grounds for a preference in the Southern District of New York, which were set out in "General Rules of Practice," Rule 12:

1. Issues in bankruptcy.
2. Causes restored to the calendar.
3. Causes in which any receiver or trustee in bankruptcy is a party.

The action was tried May 6, 1932. About six months later Rule 20 of the "Calendar Rules" was adopted, to go into effect November 14, 1932, which took the place of former Rule 12 and added an additional provision:

> "D. Causes which in the judgment and discretion of the calendar judge are entitled to a preference for exceptional and meritorious reasons."

There was no such provision, however, from the time this action was brought to the time of trial thereof.

POINT III.

The respondent, the United States, waived any immunity to which it was entitled by entering into commercial business in competition with private owners and by the Suits in Admiralty Act of March 9, 1920, Chapter 95, Sections 1, 2, 6 (46 U. S. C. 741, 742, 746).

One of the peculiar things in this action is that both the District Court and the Circuit Court of Appeals, in their decisions, neglected or failed to consider the vital point that, even if the relief, provided for by R. S. 4529 (46 U. S. C. 596), *were a penalty, and not wages or compensation, the respondent, the United States, divested itself of all sovereign character and waived immunity, both by entering into commercial business in competition with private owners, and by and under the Suits in Ad-*

miralty Act of March 9, 1920, Chapter 95, Secs. 1, 2 and 6 (46 U. S. C. 741, 742, 746).

Even before the Suits in Admiralty Act was passed it had been held by this Court, in the case of *The Lake Monroe* (250 U. S. 246), that the vessel, *The Lake Monroe*, was subject to libel even though it was claimed that said vessel was exempt from seizure on the ground that it was the property of the United States. The vessel, *The Lake Monroe*, which was owned by the United States Shipping Board Emergency Fleet Corporation, was libeled on account of damages sustained in a collision. The libellant claimed that the vessel was not exempt from seizure under Section 9 of the Shipping Board Act of September 7, 1916 (46 U. S. C. 808), which read in part:

> Section 808 • • • Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein.

The court so held, saying (pp. 254, 255, 256):

> "The provisions of Section 9 of the Act of Sept. 7, 1916, that vessels purchased, chartered or leased from the Shipping Board, while employed solely as merchant vessels, should be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States were interested therein as owner or otherwise, was a most material restriction, deemed by Congress to be essential to subject them to the same duties and liabilities as privately owned merchant vessels with which they competed • • •."
>
> "Her service at the time was purely commercial, and she was subject by the terms of the act to the ordinary liability of a merchant vessel, notwithstanding the indirect interest of the Government in the outcome of her voyage. • • • We deem it clear, also, that among the liabilities designated by the

> section is the liability of a merchant vessel to be subjected to judicial process in admiralty for the consequences of a collision."

In order to avoid the inconvenience and delay of the seizure of vessels owned by the United States, or in which it had an interest, the Suits in Admiralty Act of March 9, 1920, was passed. In this act, all liabilities of private owners were assumed by the United States, but the vessels owned by it or its corporations were exempt from libel.

> *Eastern Transportation Co.* v. *United States*, 272 U. S. 675.

That it was the intent of Congress that the United States should waive all immunity, and should stand in the same position as the owners of privately owned vessels, clearly appears from the legislative history of the Act which is set forth as Appendix I (pp. 63-71).

It was recognized by Congress that the Suits in Admiralty Act went well beyond the provisions of Section 9 of the Shipping Board Act of 1916, and also well beyond the doctrine of *The Lake Monroe* (250 U. S. 246), as appears in Appendix I (p. 69).

The Suits in Admiralty Act (March 9, 1920, c. 95, Secs. 1, 2, 6; 41 Stat. 525, 525, 527; 46 U. S. C. 741, 742, 746) provides as follows:

> Section 741. Exemption of United States vessels and cargoes from arrest or seizure.—No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall, in view of the provision herein made for a libel *in personam*, be subject to arrest or seizure by judicial process in the United States or its posses-

sions: *Provided,* That this chapter shall not apply to the Panama Railroad Company.

Section 742. Libel *in personam.* In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel *in personam* may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation • • •.

Section 746. Exemptions and limitations of liability. The United States or such corporation shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators, or agents of vessels.

In or about the year 1932, an amendment to Section 5 of the Seamen's Act was before Congress. The amendment was for the purpose of allowing actions to be continued against the United States or the United States Shipping Board Merchant Fleet Corporation, formerly known as the United States Shipping Board Emergency Fleet Corporation. On or about June 6, 1932, the Senate Committee on the Judiciary submitted its report, Calendar No. 821, Report No. 771, 72nd Congress, which contains the following statements:

"To Amend Section 5 of the Suits in Admiralty Act"

"Mr. Austin, from the Committee on the Judiciary, submitted the following

"Report

"(To accompany H. R. 7238)

"• • • When the United States Government began to engage in the operation of merchant vessels, it

sought in every way possible to compete for freights with the merchant vessels of private carriers of similar freight, most of which were of foreign nationality. In its competitive efforts to get business, it found itself handicapped because, as a sovereign Government, it could not be sued except by special act of Congress in each case, whereas a private carrier was readily amenable to the process of the courts in the event of death or injury to seamen or of any damage caused by the vessel or its operators to the cargoes or passengers on board. This led to the use of vessels of private carriers in preference to those of the Government.

"In order to remove that competitive handicap, the United States Shipping Board Emergency Fleet Corporation requested Congress to permit seamen, cargo shippers, and passengers on Fleet Corporation vessels to sue the United States in the same manner as if the seamen were employed by, or the cargo were shipped, and the passenger sailed on a privately owned vessel * * *."

In the report, No. 1012, 72nd Congress, 1st Session, submitted by the Committee on the Judiciary of the House of Representatives the intent of the Suits in Admiralty Act also clearly appears, as follows:

"AMEND THE SUITS IN ADMIRALTY ACT"

"Mr. Montague, from the Committee on the Judiciary, submitted the following

"REPORT

"(To accompany H. R. 7238)

"The Committee on the Judiciary, to whom was referred the bill H. R. 7238, after consideration, reports the same favorably with an amendment and recommends that the bill as amended do pass.

"The committee amendment is as follows:

"The chief purposes which Congress sought to accomplish by the passage of the admiralty act were:

"1. To free the United States Government from the embarrassment and necessity of putting up bonds in those cases where United States merchant vessels were seized and suits commenced *in rem.*

"2. To enable the merchant vessels of the United States Fleet Corporation to compete for freights on an equal footing with other American and foreign merchant ships.

"*This was done by abandoning the immunity which the United States enjoyed from suits in personam against the Fleet Corporation for such acts as a private carrier could be sued for in the courts of this country.*

"In this connection, Congress first legislated on the subject in the shipping act of 1916 (39 Stat. 728, c. 451) of which section 9 provides:

"Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien or other interest therein." (Italics ours.)

In the *Matter of Snug Harbor* (283 Fed. 1015), where the question of the Suits in Admiralty Act was raised, it is said (p. 1018):

"* * * So it would seem that Congress, in the passage of the Act of March 9, 1920, intended to waive its claim of immunity, and place itself upon a parity with other ship owners engaged in similar trade and traffic; *to take upon itself the same obligation that by law it imposes upon others in like business* * * *. Not only therefore does the express language of the act, but equally the failure to limit its terms, lead to the conclusion of an abandonment of immunity,* under the circumstances obtaining in the instant case." (Italics ours.)

In the same case, under the title of *Eastern Transportation Co.* v. *United States* (272 U. S. 675), this Court said (pp. 687, 688):

> "It is first objected to the recovery here that it was not intended by the Suits in Admiralty Act to subject the United States itself to prosecution for a *crime* which it denounces in its legislation. We need not be troubled by this objection, because there is no attempt here to prosecute the United States or any of its agents criminally. The declaration that the leaving of a wreck in a navigable channel in a place dangerous to passing steamers without notice of the danger and without immediate removal is unlawful, makes such omission a maritime tort, which, if merchant vessels of the United States are to respond in tort, may be recovered for in its admiralty courts against the United States without anomaly. *The Fahy*, 153 Fed. 866; *The Macy*, 170 Fed. 930; *People's Coal Company*, 181 Fed. 609, 188 Fed. 892. Under the Tucker Act and the general jurisdiction of the Court of Claims, of course, the United States is made liable only upon a contract express or implied, and not for a tort; *but its liability provided for in the Suits in Admiralty Act can not be limited to contracts any more than the liability of its merchant vessels under the Shipping Act of 1916 could be so limited. The Lake Monroe*, 250 U. S. 246." (Italics ours.)

Eastern Transportation Co. v. *United States*, 29 Fed. (2) 588;

United Fruit Co. v. *United States Shipping Board Merchants Fleet Corp.*, 42 Fed. (2) 222.

The Act of March 9, 1920, Chapter 93, Section 6 (46 U. S. C. 746) provides:

> "The United States or such corporations shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators or agents of vessels."

The United States, having taken away the right of the libellant, the petitioner herein, to libel the vessel, the S. S. *American Shipper*, and having accepted all the provisions of the Suits in Admiralty Act and all the exemptions and limitations of liability provided thereunder, must also assume all liabilities that would be assumed by or imposed upon private owners.

> *Eastern Transportation Co.* v. *United States*, 272 U. S. 675, 690.

The United States has not hesitated to urge its right to limitation of liability under this Section.

> *The Moosabee*, 7 Fed. (2) 501.

In the cases of *Lynch* v. *United States and Wilner* v. *United States*, recently decided by this Court, June 4, 1934 (78 U. S. Sup. Ct. Law Edition, p. 997), suit was brought on what may be referred to as two war insurance policies. It was contended on behalf of the respondent, the United States, that Section 17 of the Economy Act repealed "all laws granting or pertaining to yearly renewal term insurance." This Court held that the United States itself could not abrogate outstanding rights. On page 1001 it is said:

> "The Fifth Amendment demands that property be not taken without just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a state or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. *United States* v. *Central Pacific R. R. Co.*, 118 U. S. 235, 238; *United States* v. *Northern Pacific R. R. Co.*, 256 U. S. 51, 64, 67. When the United States enters into contract relations its rights and duties therein are governed generally by the laws applicable to contracts between private individuals."

The United States was clearly in business in competition with private concerns and was bound by its contract with the libellant McCrea, and had lost any immunity it might have had as a sovereign. Any other construction would constitute an unfair discrimination against seamen employed on merchant vessels owned by the United States and would result in taking their property without just compensation, which is prohibited by the due process clause of the Fifth Amendment to the Constitution of the United States.

In the case of *Ohio* v. *Helvering*, decided May 28, 1934 (78 U. S. Sup. Ct. Law Edition, p. 911), this Court said (p. 912):

> "Whenever a state engages in a business of a private nature it exercises non-governmental functions, and the business, though conducted by the State, is not immune from the exercise of the power of taxation which the Constitution vested in Congress.
>
> "If a state chooses to go into the business of buying and selling commodities, its right to do so may be conceded so far as the federal constitution is concerned; but the exercise of the right is not the performance of a governmental function, and must find its support on some authority apart from the police power.
>
> "When a state enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tanto*, and takes on the character of a trader, so far, at least, as the taxing power of the government is concerned."

In *Georgia* v. *Chattanooga* (264 U. S. 472), the City of Chattanooga sought to condemn lands owned by the State of Georgia. The lands were used by Georgia for railway purposes. Georgia sought to enjoin the condemnation proceedings. It is said (p. 481):

> "The sovereignty of Georgia was not extended into Tennessee. Its enterprise in Tennessee is a

> private undertaking. It occupies the same position there as does a private corporation authorized to own and operate a railroad; and, as to that property, it cannot claim sovereign privilege or immunity. *Bank of United States* v. *Planters Bank*, 9 Wheat. 904, 907; *Bank of Kentucky* v. *Wister*, 1 Pet., 318, 323; *Louisville, C. and C. R. R.* v. *Letson*, 2 How. 497, 550; *South Carolina* v. *United States*, 199 U. S. 437, 463."

On page 482, it is said:

> "Having divested itself, (the State of Georgia), of its sovereign character, and having taken on the character of those engaged in the railroad business in Tennessee (*Bank of U. S.* v. *Planters Bank*, *supra*), its property there is as liable to condemnation as that of others, and it has, and is limited to the same remedies as are other owners of property in Tennessee."

The United States had been engaged in private business, operating vessels on the high seas as merchant vessels in competition with private owners. All merchant vessels were subject to libel, and it has been held by this Court that vessels owned by the United States, whether registered in its name or by some board or corporation in its behalf, were subject to libel, the same as that of any other operator or shipowner.

The Lake Monroe, 250 U. S. 246.

Desiring to do away with the inconvenience of having merchant vessels owned by it subject to libel, the Suits in Admiralty Act was passed in which the United States agreed and contracted that the vessels should not be libelled, but that, in place thereof, suit could be brought against the United States with the same force and effect as though against a private owner. These provisions were embraced in the contract with the sea-

men and the rights thereunder could not be abrogated by the United States itself.

> *Lynch* v. *United States*, 78 U. S. Sup. Ct., Law Ed. 997.

Yet, in the present case, *McCrea* v. *United States*, the Circuit Court of Appeals tries to do something which Congress could not do. That is, abrogate the rights McCrea had under his contract with the United States, including those rights arising from the Suits in Admiralty Act. It will be noted that in the opinions of the District Court and the Circuit Court of Appeals nothing is said about the Suits in Admiralty Act.

POINT IV.

The libellant was entitled not only to his discharge, but also to one month's wages over and above the wages due and to some provision for his transportation home, under R. S. 4583 (46 U. S. C. 685).

R. S. 4583 (Dec. 21, 1898, C. 28, Sec. 18; 30 Stat. 760; 46 U. S. C. 685) reads:

> "Section 685. Wages on justifiable complaint of seaman. Whenever on the discharge of a seaman in a foreign country by a consular officer on his complaint that the voyage is continued contrary to agreement, or that the vessel is badly provisioned or unseaworthy, or against the officers for cruel treatment, it shall be the duty of the consul or consular agent to institute a proper inquiry into the matter, and upon his being satisfied of the truth and justice of the complaint, he shall require the master to pay to such seaman one month's wages over and above the wages due at the time of discharge, and to provide him with adequate employment on board some other vessel, or to provide him with a pass-

> age on board some other vessel bound to the port from which he originally shipped, or to the most convenient port of entry in the United States, or to a port agreed to by the seaman."

The libellant claimed that, by reason of the violation of Section 2 of the Act of March 4, 1915 (46 U. S. C. 673) by the respondent, the voyage was continued contrary to agreement, and also that the vessel was unseaworthy; that, by reason thereof, and by reason of the fact that he was entitled to his discharge in a foreign port, he was entitled to the relief provided for by R. S. 4583 (46 U. S. C. 685), to wit, one month's pay and provision for his transportation back to the United States.

As to the first ground for asking a discharge, the voyage was continued contrary to agreement because, by proceeding with watches unevenly divided, the ship owner breached the statute relating thereto, Sec. 2, of the Act of Mar. 4, 1915 (46 U. S. C. 673), and this statute was embraced in and had become a part of the contract between the seaman and the owner.

That the statutes in regard to seamen form a part of their contract is a recognized principle of law. It is stated in the case of *Covert* v. *British Brig Wexford* (3 Fed. 577). The seamen there claimed wages due under the British Merchant Shipping Act (17 and 18 Vict., C. 104), and additional wages during the time payment was delayed. Choate, *J.*, said (p. 579):

> "The contract with the seaman is to be deemed made with reference to the existing law governing the ship, which, in this case, is the British law, and the right to the extra pay must be deemed secured to them by the contract itself."

And again, with reference to the claim of the master of the *Wexford* to a lien, the court said (p. 509):

> "The contract with the master is made with reference to the statute, and the lien or interest

> in the vessel is thereby given to him as part of the consideration for his service. It is immaterial that the lien is not *created* by the maritime law. The admiralty courts enforce liens created by statute or by agreement, and thereby annexed to or made part of a maritime contract." (Italics ours.)

In *Cox* v. *Lykes Bros.*, (237 N. Y. 376), Mr. Justice Cardozo discussed the statute relating to two days' pay for one, while payment was delayed. Pointing out that in fairness, seamen so situated should recover more than the wages due, he said (p. 379):

> "How much this extra amount should be, would often be a troublesome question if it were left open in every case. 'Hence, it might be deemed advisable to have this indefinite element made definite by a general law, with reference to which the parties may conclusively be presumed to have contracted, and which, therefore, should be taken to be the law of the contract' (*Calvin* v. *Huntley, supra; Gerber* v. *Spencer*, 278 Fed. Rep. 887; *Covert* v. *British Brig Wexford*, 3 Fed. Rep. 577, 578, 579)."

"Contrary to agreement" means any breach of contract. If the articles and the statutes relating thereto are breached in any way by the master or the owners, the voyage is continued contrary to agreement and the seaman is entitled to ask for his discharge.

The opinion of the District Court adopted as its own a report of the Attorney-General (35 Opinions of Attorney-General, 292) which attempted to narrow any breach of agreement so as to relate only to a possible protracting of a voyage, or to prolonging it unnecessarily. This contention was based on the wording of some of the former enactments of this section, but there is no foundation for this limitation. There is no logical ground for such a restriction of meaning, even under the earlier statutes, and none at all in the present form.

As to the second ground for relief under this statute, there is no question that, when the respondent violated Section 2 of the Seamen's Act of March 4, 1915 (46 U. S. C. 673), the vessel was rendered unseaworthy, and the libellant was given additional ground to ask for his discharge under R. S. 4583 (46 U. S. C. 685).

As was said in *O'Hara* v. *Luckenbach S. S. Co.* (269 U. S. 364, 367), by Mr. Justice Sutherland:

> "The general purpose of the Seaman's Act is not only to safeguard the welfare of the seamen as workmen, but, as set forth in the title, also 'to promote safety at sea.' • • • The ship should at all times be actively manned with equal efficiency."

And again (p. 368):

> "But the provision fundamentally is a measure of precaution against those perilous and unexpected emergencies of the sea when only immediate and wakeful readiness for action may avert disaster or determine the issue between life and death."

And it was definitely held (p. 370):

> "It is not unreasonable to conclude that Congress determined that each of the watches, like the crew as a whole, should be 'adequate in number; competent and in a state of readiness for any exigency that is likely to happen'—such as collision, a striking of the ship upon a reef of rocks or an iceberg, the sudden breaking out of fire, and other happenings of like disastrous tendency—and to this end meant to provide for successive and continuous watches to be constituted in numbers as nearly equal as the sum of the whole number would permit."

In the case of *In re Meyer* (74 Fed. 881), it is said (p. 885):

> "It is the duty of the owners of a steamer • • • to provide the vessel with a crew adequate in number and competent for their duty with reference to the exigencies of the intended route."

O'Hara v. *Luckenbach S. S. Co.*, 269 U. S. 364, 367, 368;

In Re Meyer, 74 Fed. 881, 885;
In Re Pacific Mail S. S. Co., 130 Fed. 76;
Flint & P. M. R. v. *Marine Insurance Co.*, 71 Fed. 210;
The Rolph, 293 Fed. 269;
Northern Com. Co. v. *Lindblom*, 162 Fed. 250, 254.

The consul, therefore, should have directed the libellant's discharge, and should have required the master to pay to him one month's wages over and above the wages due and to make provision for his transportation to the United States. This was not optional, but obligatory, as is more clearly seen when this section is construed with the express provisions of R. S. 4580 (June 26, 1884, C. 121, Sec. 2; 22 Stat. 54; 46 U. S. C. 682). Section 2 of that statute provides:

> "Section 4580. Upon the application of the master of any vessel to a consular officer to discharge a seaman, or upon the application of any seaman for his own discharge. If it appears to such officer that said seaman has completed his shipping agreement, *or is entitled to his discharge under any act of Congress* or according to the general principles or usages of maritime law as recognized in the United States, such officer *shall* discharge such seaman, and require from the master of said vessel, before such discharge shall be made, payment of the wages which may then be due said seaman; but no payment of extra wages shall be required by any consular officer upon such discharge of any seaman except as provided in this act." (Italics ours.)

Section 3 of the act, immediately following, is R. S. 4583 (46 U. S. C. 685), under which the petitioner claimed relief, which provides for a seaman discharged in a foreign port one month's wages over and above the wages due at the time of discharge, together with transportation home.

The two sections taken together show the clear intent of congress that a seaman who leaves his vessel in a foreign port, whether at his request or at the instance of the master, shall be provided with funds additional to the wages earned.

(It will be noted that the form of the statute quoted above is that of the original enactment of June 26, 1884 [C. 121, Sec. 2] and not the restatement thereof of December 4, 1925, found in Section 682 of the United States Code, which is erroneous. The original statute is, of course, the law.)

The District Court found that the libellant was not entitled to an additional month's pay and transportation home because, granting he was entitled to his discharge on account of the violation of 46 U. S. C. 673, the relief provided for by that section was exclusive. But the libellant is not asking for the extra wages under Section 2 of the Act of March 4, 1915 (46 U. S. C. 673). He is asking for them under R. S. 4583 (46 U. S. C. 685), which regulates discharge in foreign ports. If he had asked for his discharge at any port in the United States because of the unequal division of watches, discharge would have been the only relief he might have claimed. But he was in the port of London, and could claim additional wages and transportation back to the United States under the provisions of R. S. 4583 (46 U. S. C. 685).

That a seaman may have a discharge under one statute, and additional relief under another statute when discharged in a foreign port, is expressly provided by R. S. 4580 (46 U. S. C. 682). Nor does Section 2 of the Act of March 4, 1915 (46 U. S. C. 673) limit the relief therein provided, and this failure to limit its terms gives the seaman a right to the additional relief of Section 685.

The Snug Harbor, 283 Fed. 1015, 1018.

Congress has always shown special solicitude for seamen discharged in foreign ports. They may be far

from home, and unable to speak the language of the country. In the case at bar, the libellant was turned adrift in midwinter with only the clothes he stood in, and without even the small sum of wages earned. As was said in the case of *The Howick Hall*, (10 Fed. [2] 162) at page 163:

> "Sailors are the wards of the admiralty, and the courts jealously protect their rights."

The statutes for the protection of seamen are to be liberally construed. In the case of *Wilder* v. *Inter-Island Steam Navigation Co., Ltd.* (211 U. S. 239), it was said (p. 246):

> "But we are of the opinion that the statute is not to be too narrowly construed, but rather to be liberally interpreted with a view to affecting the protection intended to be extended to a class of persons whose improvidence and prodigality have led to legislative provisions in their favor, and which has made them, as Mr. Justice Story declared, 'the wards of Admiralty'. *Harden* v. *Gordon*, 2 Mason 541.
>
> "We think, too, that the section is to be construed in the light of and in connection with the other sections of the Title of which it is a part."

In *The Donna Lane* (299 Fed. 977), the court said (p. 982):

> "Congress appears to have considered a month's wages reasonably necessary, in addition to all arrears of wages, to insure the payment of his necessary shore expenses while awaiting another ship, and to have required its payment, even when the seaman was rightfully discharged upon the master's complaint."

By a series of statutes running back to the earliest enactments of the government, the relief provided for

seamen discharged abroad has been extended and enlarged, congress has shown a growing consciousness of the need for making additional allowances to men in such a situation. They should not be left destitute, to be assisted by charity till they can ship again, or make their way home. The statutes now provide a complete scheme of relief at the expense of the owner for a seaman discharged abroad under any and all conditions unless there has been neglect of duty on his part, or unless he has been incapacitated. In the latter case, and in the case of shipwricked or destitute seamen, he is cared for by a fund maintained by the federal government (R. S. 4581, 46 U. S. C. 683; R. S. 4578, 46 U. S. C. 678). The earlier form of R. S. 4581 (46 U. S. C. 683, March 3, 1873, c. 243) suggests that one of the reasons for requiring the additional month's pay was to relieve the government of the expense of caring for destitute seamen. Under that statute, a seaman discharged for misconduct was not to receive the extra wages, "Provided that relief can immediately be offered to such seaman by reshipment without expense to the United States".

If, on the complaint of a majority of the crew, an inspector reports that a ship was sent to sea unsuitably provided, by neglect or design, the seaman is entitled to his discharge and one month's wages over and above the wages then due, or else to his passage home or to employment on some other vessel (R. S. 4561, 46 U. S. C. 658). If a vessel is sold in a foreign country, the seaman is entitled to his discharge, his wages due, and his passage home or employment on some other ship (R. S. 4582, 46 U. S. C. 684). If the master requests his discharge for any other reason than neglect of duty or incapacity, the seaman is entitled to one month's extra wages or employment on another vessel (R. S. 4581, 46 U. S. C. 683). If the seaman asks his own discharge, or if the master applies for it, before it can

be made in either case, the master must pay to the consular officer the wages then due, both earned and extra (R. S. 4580, 46 U. S. C. 682). And finally, under the section herein in controversy (R. S. 4583, 46 U. S. C. 685), the seaman who complains that the voyage has been continued contrary to agreement, or that the vessel is badly provisioned, or that it is unseaworthy, or that there has been cruel treatment by the officers, is entitled to his discharge, the wages due, an additional one month's wages, and transportation home or employment on some other vessel.

It will be observed that in the last section, the word "unseaworthy" is very general. The complaint may be made by one seaman only, a majority of the crew not being required as under R. S. 4561 (46 U. S. C. 658). The vessel may be unseaworthy because of its physical condition, or because the watches are not equally divided, or because the crew is not adequate, or because of any other possible contingency.

All these sections taken together, show the clear intent of congress that a seaman shall not be left destitute in a foreign port, but shall have, not only the wages due, but also other relief, no matter for what cause he was discharged.

The Circuit Court of Appeals held that the libellant was not entitled to the relief provided by R. S. 4583 (46 U. S. C. 685) because he had not been discharged by the consul. Discharge by a consular officer, the opinion said, and consular action requiring the master to pay and provide, are conditions precedent to the application of the section (R., 149). But reference to two other statutes governing discharge in a foreign port (R. S. 4580, 46 U. S. C. 682; R. S. 4581, 46 U. S. C. 683) shows that consular action requiring the master to pay and provide, is a condition precedent to discharge. The Circuit Court of Appeals has ruled, in effect, that the words "*on* the discharge," in sentence two of R. S.

4583 (46 U. S. C. 685), are synonymous with "*after* the discharge." On the contrary, these words are synonymous with "*before* the discharge."

The requirement that payment of wages must precede discharge in a foreign port is set forth in R. S. 4580 (46 U. S. C. 682). The section reads (so far as is applicable herein):

> "Section 4580. Upon the application of • • • any seaman for his own discharge, if it appears to such officer that said seaman • • • is entitled to his discharge under any act of congress, or according to the general principles or usages of maritime law as recognized in the United States, such officer shall discharge such seaman, and require from the master of said vessel, *before discharge* shall be made, payment of the wages which shall then be due said seaman; but no payment of extra wages shall be required by any consular officer *upon such discharge* of any seaman except as provided in this act." (Italics ours.)

The first part of the one sentence comprising the statute directs that the consul shall require of the master, "*before discharge*", payment of the wages then due. The last part of the same sentence directs that no payment of extra wages shall be required "*upon such discharge*" except as provided in the act. That is, the statute used the words "*before* discharge" as synonymous with "*upon* discharge." The words "*on* the discharge" used in R. S. 4583 (46 U. S. C. 685) are not the equivalent, as the Circuit Court of Appeals has held, of "*after* the discharge," but are the equivalent of "*before* the discharge."

"Wages due," it will be noted, as used in all these sections, includes both wages earned and additional wages required by statutory provisions.

An examination of the statutes, made and provided for the discharge of seamen in foreign ports, will show that the discharge itself is made by the master of the vessel in the presence of the consul and is for the master's protection.

R. S. 4551 (46 U. S. C. 643) provides:

> "Certificate. Upon the discharge of any seaman or upon payment of his wages, the master shall sign and give him a certificate of discharge, specifying the period of his service and the time and place of his discharge in the form marked Table B in the schedule annexed to this chapter; * * *."

If the master does not give such a discharge he is subject to penalties. The official form of the certificate of discharge of a seaman by the master before a consul is annexed hereto (Appendix II, p. 72). The master certifies that the seaman "was discharged". After the master has paid the seaman his wages due and one month's additional wages and arranged for his transportation back to the United States, and has given him his discharge, the consul certifies the certificate of discharge was "given to the above named seaman in my presence". The consul then gives the master a "Certificate of Discharge of Seaman to be Attached to Crew List and Shipping Articles." That form of the certificate is hereto annexed (Appendix III, p. 73).

The "Certificate of Discharge of Seaman to be Attached to Crew List and Shipping Articles" (Appendix III, p. 73) is for the protection of the master.

R. S. 4576 (46 U. S. C. 677) provides that the master shall exhibit to the first boarding officer, at the first port in the United States at which he shall arrive on his return, a certified copy of the list of the crew he had shipped, and must also produce the persons named therein. It also provides for a heavy penalty on the master for each member of the crew he fails to produce. It then provides:

> "* * * but such penalties shall not be incurred on account of the master not producing to the first boarding officer any of the persons contained in the list who may have been *discharged in a foreign country with the consent of the consul there resid-*

ing, certified in writing, in his hand and official seal, to be produced to the collector with the other persons composing the crew; * * *"

As is pointed out in *McAvey* v. *U. S. Emergency Fleet Corp.* (15 Fed. [2] 405), discharge is actually made by the master. In that case the court said (p. 407):

> "These are questions (reasons for discharge of seamen) for the master to decide; he is the one who makes the discharge. The consul does not 'cause' a seaman to be discharged, as the declaration alleges, in a case like the present. It is evidently based upon a misunderstanding of the law. When a *master* discharges a seaman in a foreign port, in order to protect himself under Revised Statutes, Section 4576, *supra,* he must secure the consent of the consul to his action. It has been said that the consul's action is not binding on either party * * *." (Italics and matter in parentheses ours.)

It thus clearly appears that before the consul can order the discharge of a seaman he must see that the master has paid the seaman one month's additional wages and provided for his transportation back to the United States. The master having made such provisions, and having given the seaman his discharge, the consul then endorses the discharge (Appendix II, p. 72), and also gives the certificate of the discharge of the seaman to the master (Appendix III, p. 73). The discharge, however, is given by the master.

If the master should refuse to comply with the directions of the consul for the discharge of the seaman, the consul may not return to him the ship's papers, as provided for by R. S. 1718 (22 U. S. C. 88) and by R. S. 4309 (46 U. S. C. 354). The latter section provides:

> "354. Deposit of ship's papers with consul.—Every master of a vessel, belonging to citizens of the United States, who shall sail from any port of the United States, shall, on his arrival at a foreign

port, deposit his register, sea letter, and Mediterranean passport with the consul or vice consul, if any there be at such port; and it shall be the duty of such consul or vice consul, on such master or commander producing to him a clearance from the proper officer of the port where his vessel may be, to deliver to the master all of his papers, *if such master or commander has complied with the provisions of law relating to the discharge of seamen in a foreign country, and to the payment of the fees of consular officers.*" (Italics ours.)

Without these papers the ship cannot clear. Moreover, on return to its home port or any other port in the United States the master is subject to heavy penalties for every member of the crew he does not produce unless he has the consul's certificate in relation thereto.

It appears from the testimony, introduced on behalf of the respondent, that the discharge of the seaman is given by the master, and that it is approved by the consul.

The deposition of Lowell C. Pinkerton, American Consul at London, was taken and introduced in evidence on behalf of the respondent. He testifies (R., 72):

"8. Q. In a case arising in the port of London, in which is situated a branch of the American Consular Service, has the Master of an American vessel the power to discharge a seaman without your approval *i. e.*, the approval of the American Consul?

"A. The Master has no such authority.

"9. Q. What is the procedure in relation to discharging a seaman?

"A. The procedure in relation to discharge of a seaman varies dependent upon the reason for the discharge. The Statutes in some cases provide that a formal hearing shall be conducted to determine whether the claim is justified. However, usually the consular officer to whom application is made determines for himself whether such application may be approved.

"10. Q. Must the discharge of a seaman be approved by you, *i. e.*, by the American Consul?

"A. The discharge of a seaman must be approved by a consular officer when the discharge is made abroad.

"11. Q. Can the Master of a ship upon demand by a seaman to be paid off, on arrival at London, do so without referring the matter first to your office, *i. e.*, the office of the American Consular Service?

"A. No.

"Q. (a) Why?

"A. (a) Because a fine is provided if the Master fails to produce his crew upon the return to the United States but such penalty is not provided in case the Master can produce a list of those who have been discharged in a foreign country with the consent of a Consul or Vice-Consul there residing, certified under his hand and seal."

The deposition of Daniel Miller, American Vice-Consul, was taken and introduced in evidence on behalf of the respondent. He testifies (R., 81):

"8. Q. In a case arising in the Port of London, in which is situated a branch of the American Consular Service, has the Master of an American vessel the power to discharge a seaman without your approval, *i. e.*, the approval of the American Consul?

"A. No.

"9. Q. What is the procedure in relation to discharging a seaman?

"A. When application for discharge has been made, the procedure followed, depends on the circumstances. In some cases, formal hearings are provided under the Statutes. In most cases, the consular officer can decide whether or (fol. 113) not the application should be approved.

"10. Q. Must the discharge of a seaman be approved by you, *i. e.*, by the American Consul?

"A. Yes."

It further appears from the testimony of Daniel Miller that the reason for requiring the approval by an

American Consul of the discharge of a seaman is not to protect the seaman but to protect the master. He testifies (R., 81) that the master cannot lawfully discharge a seaman in a foreign country without the intervention of a consular officer for the reason that, if he should do so, he would be subject to heavy penalties because of the violation of R. S. 4576 (46 U. S. C. 677).

Both R. S. 4580 (46 U. S. C. 682) and R. S. 4581 (46 U. S. C. 683) formed part of an act entitled "An Act to regulate the Diplomatic and Consular Systems of the United States" (August 18, 1856, c. 127, sec. 26; 11 Stat. 62). Under R. S. 4580 (46 U. S. C. 682), a seaman who is entitled to his discharge under any act of congress "shall" receive it. Under R. S. 4581 (46 U. S. C. 683), a consul who does not require the master to pay the wages and extra wages directed when a seaman is discharged, is personally liable to the United States for the amount he should collect before the discharge is given. This section reads (so far as is applicable herein):

> "Section 4581. If any consular officer, when discharging any seaman, shall neglect to require the payment of and collect the arrears of wages and extra wages required to be paid in the case of discharge of any seaman, he shall be accountable to the United States for the full amount thereof. The master shall provide any seaman so discharged with employment on a vessel agreed to by the seaman, or shall provide him with one month's extra wages, if it shall be shown to the satisfaction of the consul that such seaman was not discharged for neglect of duty, incompetency, or injury incurred on the vessel. If the seaman is discharged by voluntary consent before the consul, he shall be entitled to his wages up to the time of his discharge, but not for any further period. If the seaman is discharged on account of injury or illness, incapacitating him for service, the expenses of his maintenance and return to the United States shall be paid from the

> fund for the maintenance and transportation of destitute American seamen . . . " (March 4, 1915, c. 153, sec. 19; 38 Stat. 1185).

In the case at bar, the consul arbitrarily refused to require the master to give the seaman a certificate of discharge, but he should have done so, as both the District Court and the Circuit Court of Appeals have found. The consul stated that he was not concerned with the decision of the United States Supreme Court, in the case of *O'Hara* v. *Luckenbach S. S. Co.* (*supra*). Yet the Circuit Court of Appeals has held that a seaman has no recourse when arbitrarily denied the discharge to which he is entitled.

It has been repeatedly held that, even in relation to findings of fact by a consul, his determination is not conclusive. It is *prima facie* only, and may always be opened up by the courts in a proper case.

> *Campbell* v. *The Uncle Sam*, 1 McAll. 77; Fed. Cas. No. 2372;
> *The Donna Lane*, 299 Fed. 977;
> *The T. F. Oakes*, 36 Fed. 442;
> *The W. F. Babcock*, 85 Fed. 978;
> *McAvey* v. *U. S. Emergency Fleet Corp.*, 15 Fed. (2) 405.

In the case of *Campbell* v. *The Uncle Sam* (1 McAll. 77), seamen brought an action for wages and extra wages under R. S. 4583 (46 U. S. 685). They had shipped from San Francisco to San Juan del Sur, but the master put into Panama instead. They were there discharged on their request, but without pay and over the objections of the master. When the action was brought, the respondent objected that the men were not entitled to discharge, and that the procedure of the consul had been not only illegal but fraudulent. The court held that the master had broken the contract with the men by altering the destination of the voyage, and said (p. 79):

> "• • • the seamen were entitled to their discharge according to the general principles of the law merchant, without the intervention of the consul at Panama. The acts of Congress on that subject are cumulative, made for the protection of seamen, and with a view to afford them a prompt remedy; certainly not to withdraw from them the protection of the courts. *Whatever had been the action of the consul, or the form of his certificate,* • • • *whether legal or illegal, regular or irregular,* • • • *it could not be conclusive upon this court, nor shut its door upon the libellants.*" (Italics ours.)

And again (p. 80):

> "In *Hutchinson* v. *Coombs* (Ware, 65), it is laid down that the certification as to the discharge of a seaman will not preclude the court from inquiring into the cause of his discharge, and awarding damages if his discharge was unjustifiable. Whether the law under which the consul acted be constitutional or not; whether, if constitutional, the conduct of the consul was in strict accordance with it; whether his action was honest, or, as is alleged, • • • covinous, are not the subject of inquiry. *The question is, 'Were the libellants entitled to their discharge?'* After the breach of the contract by the claimants, and the detention of the libellants, arising out of that breach, for upwards of a month at Panama, I consider them entitled to such discharge." (Italics ours.)

In the case of *The Donna Lane* (299 Fed. 977), the libellants refused to assist with the cargo on Sunday, basing their refusal on Section 2 of the Act of March 4, 1915 (46 U. S. C. 673). They were discharged in Hong Kong at the request of the master, but were not paid extra wages. The court, holding the findings of the consul were not conclusive, said (p. 982):

> "By Section 4554, R. S. (Section 8343 Comp. Stat.), the award of a shipping commissioner is conclusive upon any question between the master and any of his crew, when the question is submitted to him by both parties in writing. There is no

similar statute applicable to hearings before a consul. No reason appears in the present case, in the absence of a settlement before a shipping commissioner at the end of a voyage, to depart from the general rule; that the final adjudication as between the parties of the amount due to a person for services will be left for determination in a suit by the person claiming for services."

In the case at bar, the question of the right to discharge was not even one of fact, but of law, and the consul assumed to determine the point in contradiction to the decision of the Supreme Court of the United States. That the consul decided a question of law erroneously is no bar to the libellant's pressing his claim in the courts for additional wages and provision for his transportation, the prerequisites to the discharge to which he was also entitled.

A seaman who leaves his ship when he has a right to do so, when his contract has been broken by the master or owner, is not a deserter, though he was not discharged in the presence of a Shipping Commissioner as required by 46 U. S. C. 641, and he can bring an action in the federal courts to recover the wages due him.

O'Hara v. *Luckenbach S. S. Co.*, 269 U. S. 364;
Southern Pacific Company v. *Hair et al.*, 24 Fed. (2d) 94;
Thompson v. *Lucas*, 252 U. S. 358.

By the same reasoning, a seaman who leaves his ship in a foreign port because his contract has been broken by the master or owner, and is refused his discharge to which he had a right under an act of congress, can bring an action in the federal courts to recover the additional wages due him under the statute. The only question is, "Was he entitled to his discharge?" No act of the master or of the consul can shut the door of the courts to a seaman who was within his rights in demanding his discharge.

POINT V.

The judgment or decree, signed August 12, 1932, and entered August 15, 1932, was never vacated or set aside, and the court erred in entering the decree dated March 9, 1933.

The Court of Appeals in its opinion (R., 147) devotes considerable space to a discussion of the decree signed August 12, 1932 and entered August 15, 1932, and the decree signed March 8, 1933 and entered March 9, 1933. Although these questions do not go to the merits of the construction of the sections of the Seamen's Act, particularly U. S. Code, Title 46, Sections 596, 673, 685, 741, 742 and 746, and the constitutional points involved, the Court of Appeals deemed them important (R., 146, 147, 148).

The first judgment or decree in this action was signed by the District Court on *Friday*, August 12, 1932, after a hearing in relation to its form, at which time both sides were represented and the form of the decree agreed on (R., 109). *Saturday*, August 13, 1932, was a half holiday. The judgment or decree was entered *Monday*, August 15, 1932. The letter of the proctor for the respondent, requesting a rehearing in this case, is dated August 13, 1932. This was *Saturday*. A copy was sent to the proctor for the libellant but it was not received by him until *Monday*, August 15, 1932.

The Circuit Court of Appeals stated (R., 147):

> " • • • It is apparent that the entry of the decree of August 15th, two days after the request for rehearing was made, was irregular. At that time, the matter of a rehearing was pending and a rehearing without restriction was granted August 30th • • • ."

There is absolutely nothing in the record to uphold this conclusion. While it is true the letter on behalf of the respondent was dated August 13, 1932, which was a Saturday, there is nothing to show that it was

sent to or received by the court on or before Monday, August 15, or in fact, on or before August 30, (R., 130, 131).

No motion was made to vacate or modify the decree of August 15, 1932. In the opinion of the District Court, modifying the decree of August 15, 1932, the court said (R., 110):

> "By memorandum opinion, dated August 30, 1932, a reargument of this case was granted • • • . The decision previously rendered is modified • • • ."

A decision is not a decree. *G. Amsinck* v. *Springfield Grocery Co.* (7 Fed. [2] 855, 858, 859).

The case of *Hook* v. *Mercantile Trust Co. of N. Y.* (95 Fed. 41), cited by the Circuit Court of Appeals, is one where a decision had been handed down by the Court of Appeals, but it does not appear that any judgment had been entered thereunder. A motion was made by both sides for a rehearing and the motion was granted, and upon the rehearing the decision was modified.

POINT VI.

The respondent, the United States, did not plead that the relief, provided for by R. S. 4529 (46 U. S. C. 596), was a penalty, and made no motion to amend its pleadings.

On the hearing before the District Court on the motion for a reargument of the case, a point was raised by the libellant, petitioner herein, that the respondent, the United States, had not pleaded that the relief, provided for by R. S. 4529 (46 U. S. C. 596), was a penalty. Notwithstanding this, the respondent made no motion to amend its pleadings. If the contention of the respondent was correct, and the relief provided for by R. S. 4529 (46 U. S. C. 596) was a penalty, the proctor for the respondent knew, or claimed he knew, or he should have known it, at the time of the argument on the rehearing,

but he did not make any motion to amend his pleadings. The respondent admitted that jurisdiction had been obtained and that the action was for wages (R., 8). It was found by the Circuit Court of Appeals that the vessel in question, the S. S. *American Shipper*, "was owned by the United States and was a merchant vessel subject to the provisions of Section 2 of the Seamen's Act of March 4, 1915 (46 U. S. C. 673)." (R., 145.)

The respondent, not having raised in its pleadings the question that the relief provided for by R. S. 4529 (46 U. S. C. 596) was a penalty, and having made no motion to amend its pleadings, it should not have been allowed to raise that question. This point was presented to the Circuit Court of Appeals, but they did not pass upon it in any way.

In the case of *Avery* v. *United States* (12 Wall. 304), the court said (p. 306):

> "It is a familiar principle that no one can be relieved against a judgment, however unjust he may consider it, if he had a defense and, through his own fault, failed to present it * * * It would lead to endless embarrassments in the administration of justice, if a party were permitted to reopen a judgment on the ground that he had a defense that he did not present, because ignorant of it, but which, the court can see, he could have known if he had used reasonable diligence to ascertain it."

CONCLUSION.

Wherefore the petitioner prays that the decree of the United States Circuit Court of Appeals, denying the petitioner the relief provided by R. S. 4529 (46 U. S. C. 596), and the relief provided by R. S. 4583 (46 U. S. C. 685), be reversed, and that the petitioner be granted the relief provided in the said sections.

All of which is respectfully submitted.

JOHN M. SCOBLE,
Proctor for Petitioner.

K. COURTENAY JOHNSTON,
Of Counsel

APPENDIX I.

Legislative history of the Suits against United States in Admiralty Act.

I.—There are three drafts of the Suits against the United States in Admiralty Act, the second and third drafts being almost absolutely the same, with merely the slightest of changes between them, and the third draft being the present Suits in Admiralty Act as passed by the Senate and the House of Representatives without any change whatsoever.

Essentially all these drafts are the same, and the apparent differences exist chiefly between the first and second drafts. But these differences are more apparent than real, because while sentences have been shifted around from one section to another between the first two drafts, each one has practically the same content.

II.—The first draft of the Act was drawn up in the summer of 1919 by Mr. Ira A. Campbell, then Special Assistant to the Attorney General and in charge of admiralty litigation. He had previously been Admiralty Counsel of the United States Shipping Board from May 1, 1918, before he became Assistant to the Attorney General. As a result of his practical experience in these positions he drafted H. R. 7124.

At the Hearing Before the Committee on the Judiciary, House of Representatives, Sixty-sixth Congress, First Session, held August 26, 1919, he testified, according to the official report, as follows:

Pages 11-12.

> "Mr. Campbell: I will now read the bill, H. R. 7124:
>
> 'A BILL authorizing suits against the United States in admiralty, for salvage services, and providing for the release of merchant vessels

belonging to the United States from arrest and attachment in foreign jurisdictions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the United States, and any corporation in which the United States owns not less than a majority of the capital stock, may be sued *in personam* in the district courts of the United States in admiralty for any cause of action of which said courts ordinarily have cognizance in their admiralty and maritime jurisdictions——'

"Mr. Steele: What was your idea in using the word 'ordinarily' within the jurisdiction? Would it not be clearer if you left the word 'ordinarily' out?

Mr. Campbell: I will tell you why I used it. What I am trying to do is to place the Government in the same position in suits in the admiralty courts as the private owner is. I put that word in there to try to express and convey that particular intention * * *.

I will continue reading:

'arising since April 6, 1917, out of or in connection with the possession, operation, or ownership by the United States or such corporation of any merchant vessel, or the possession, carriage, or ownership by the United States or such corporation of any cargo in those cases where, if the United States were suable as private party, a suit *in personam* could be maintained, or where, if the vessel or cargo were privately owned and possessed, a libel *in rem* could be maintained and the vessel or cargo could be arrested or attached at the time of the commencement of suit.'

In brief, that means the United States could be sued *in personam* in any case arising out of the carriage, etc., of cargoes by Shipping Board vessels, where a private citizen could be sued."

III.—Section 1, therefore, specifically says that a pure suit *in personam can be maintained*: "The United

States * * * may be sued *in personam* * * * in those cases where, if the United States were suable as a private party, a suit *in personam* could be maintained * * * ."

This was the intention of the draftsman and the clear understanding of the Committee of the Judiciary, as shown by the following statements from the official report:

Page 14.

> "Mr. Webb: Does this section take away the right of bringing an action *in rem?*
>
> Mr. Campbell: No, sir; in the next section I cover that. This first section gives the right of action *in personam.*
>
> Mr. Webb: That is the only change in existing law that this section makes?
>
> Mr. Campbell: I could not say absolutely that there is no change in existing law, because the only law we have on the subject today is that grounded upon Section 9 of the Shipping Board Act, as interpreted from the Supreme Court decision in the *Lake Monroe* case. That says nothing about liability with respect to ownership and carriage of cargoes and the like of that. This does. But the situation is simply this, that the government has been and is engaged in commercial pursuits with vessels. It is now carrying cargoes for everyone who applies, and there is no reason why the Government, in the operation of this commercial fleet in commercial trades, should not be subject to the same liabilities as the private owner who engages in that business."

IV.—Section 1 having covered suits purely *in personam*, Section 2 was intended to cover suits nominally *in personam*, but proceeding according to the principles of suits *in rem*. This again appears clearly from the testimony at the official hearing:

Page 16.

> " 'Sec. 2. That no suit *in rem* shall be brought against nor any warrant of arrest or attachment

levied upon any vessel owned or operated by or demised to or in the possession of the United States or such aforesaid corporation, nor against nor upon any cargo owned or/and in the possession of the United States or such corporation, but any suit brought hereunder shall, if the libelant so elects in his libel, proceed in accordance with the principles of suits *in rem* in all cases wherein maritime liens exist and where, if the vessel or cargo with respect to which the action arises were privately owned and possessed, a libel (suit) *in rem* could be maintained and the vessel or cargo arrested or attached at the time of the commencement of suit; but election to proceed as aforesaid as *in rem* shall not preclude the libelant in a proper case from also seeking relief *in personam* in the same suit.'

Mr. Webb: You read 'suit' in line 15.

Mr. Campbell: 'Libel' should be changed to 'suit'. That is a slip on my part. Use the word 'suit' throughout.

Let me explain that section. It first provides that no suit *in rem* shall be brought nor any vessel of the United States, and that any cargo owned and in possession of the United States, shall not be libeled or attached, but any suit brought under this bill, and that is a suit authorized by the first section, suits *in personam*——

> 'shall, if the libelant so elects, proceed in accordance with the principles of suits *in rem*, in all cases where maritime liens exist, and where, if the vessel or cargo with respect to which the action arises were privately owned and possessed, a suit *in rem* could be maintained and the vessel or cargo arrested or attached at the time of the commencement of suit.'

That it contemplates meeting this situation. There are cases where a libelant acquires a different right *in rem* than *in personam*. I think I can state the law, if my friends will correct me. I believe the law is that if a vessel is in collision while her navigation is under the control of a compulsory

pilot, she is liable *in rem*, but that you could not hold the owner liable for an action *in personam*. Now, there may be cases, I can not state them to you at the moment, where a different ranking of liens may be given in actions *in rem* than in actions *in personam*.''

V.—As a corollary of the liability intended to be imposed upon the United States according to this draft, both *in personam* and *in rem*, which liability was intended to be co-extensive with that of any private owner, the United States was then granted the benefits of all limitations of liability accorded by law to private persons.

Page 17:

''Mr. Campbell: • • • I will read Section 3.

'Sec. 3. That the United States and such aforesaid corporation shall be entitled to the benefits of all exemption from and all limitations of liability accorded by the statutes of the United States and of the several States and Territories and by the maritime law to the owners, charterers, operators, and agents of vessels.'

In other words, I confer expressly upon the Government all the rights which private owners have with respect to the limitation of their liabilities, the plan being, or the attempt being, to place the Government in the same position as a private owner.''

VI.—The purpose of the draftsman was to cover all causes of action cognizable in admiralty.

Page 46:

''Mr. Webb: Mr. Campbell, what is the result in this bill of the United States being sued directly?

Mr. Campbell: What is the result?

Mr. Webb: Yes; in what cases would suit be brought against the United States, by name, instead of the corporation?

Mr. Campbell: *In all cases of tort and contract arising out of possession, ownership, or operation*

> *of* any *ship, any merchant vessel,* as the bill now reads, possession or ownership. (Italics ours.)
> Mr. Webb: You would sue the United States?
> Mr. Campbell: Yes, sir."

In a word, as Mr. Campbell said, and substantially this statement was repeated again and again by the proponents of the bill on the floor of Congress:

Page 14:

> "* * * the Government has been and is now engaged in commercial pursuits with vessels. It is carrying cargoes for everyone who applies, and there is no reason why the Government, in the operation of this commercial fleet in commercial trades, should not be subject to the same liabilities as the private owner who engages in that business."

For the convenience of the Court we have set forth hereinafter all the relevant extracts from the Congressional Record which, in our opinion, throw light upon the passage of the bill and serve to show what the real intent of Congress was.

The principal debate upon the bill was held in the House of Representatives, where the bill was sponsored by Mr. Volstead and supported by Mr. Husted and Mr. Walsh.

On January 17, 1920, Mr. Volstead, in introducing the bill, spoke as follows (Congressional Record, Vol. 59, Part 2, page 1680):

> "Sec. 9 of the Shipping Act made the Government of the United States liable for marine torts. Simple justice required that if the Government entered upon the business of carrying freight we ought to make the Government stand in practically the position of a private individual as to liability, so that those who might be injured by its operation could have a remedy. Under the old law the Government could not be sued. * * *"

It was recognized in Congress that the Act by its broad terms went well beyond the provisions of Section 9 of the Shipping Act of 1916 and also well beyond the doctrine of the "*Lake Monroe*", 250 U. S. 246.

Pages 1685-1686. January 17, 1920:

> "Mr. Oliver: If the gentleman's amendment is adopted by the House it will give a right of action in many cases against the Government where that right does not now exist?
>
> Mr. Husted: Oh, yes; in very many cases.
>
> Mr. Oliver: I wish to call attention to that, because in replying to the question propounded by the gentleman from Illinois (Mr. Madden), the gentleman's answer did not convey that idea. This bill carries forward the right to sue the Government much further than the *Lake Monroe* case does.
>
> Mr. Husted: Oh, very much. The *Lake Monroe* case was solely confined to merchant vessels and the merchant service.
>
> Mr. Whaley: And under charter.
>
> Mr. Husted: And under charter.
>
> Mr. Whaley: They had to be under charter. If they were in ballast the action would not lie.
>
> Mr. Husted: My amendment creates a right of action against the vessels of the United States under these four important limitations.
>
> Mr. Oliver: In other words, it gives a right of action against the Government for any act of negligence in the performance of a governmental function.
>
> Mr. Husted: Not any act of negligence, but any act of negilgence in the operation of vessels upon the high seas.
>
> Mr. Oliver: Yes.
>
> Mr. Husted: Or upon inland waters, where they meet on equal terms, citizens of the United States engaged in private shipping."

By both Mr. Volstead, Mr. Husted and Mr. Walsh, it was stated that the reason for passing the Act was that where the Government managed and operated ves-

sels which it controlled, as a business enterprise, it ought to go upon the same footing as a private individual and a private corporation, and since the Government was in competition with privately owned vessels, it ought to be put upon the same footing with them.

> "Mr. Husted: My amendment is based in reason upon the common justice of granting relief to the citizens of the United States who have been injured through the negligence or incompetent operation of public vessels of the Government of the United States.
>
> I do not think I can do better, in the discussion of the question of the moral responsibility of the Government in these cases, than to quote from a very able brief of Senator Hoar, of Massachusetts, who was chairman of a committee that investigated this question. This report of Senator Hoar has been commented upon favorably in a number of cases in the Court of Claims.
>
> > 'The Committee think that the Government of the United States is not liable for loss or damage occasioned to private citizens by reason of any imperfection in the performance of the ordinary functions of government or by reason of the acts, omissions, or negligence of its officers or agents in the discharge of such functions * * *.
> >
> > 'But we are of the opinion that there are two classes of cases where sound public policy requires the United States and all other sovereign Governments to hold themselves responsible for injuries occasioned by the negligence of their agents. One is where the Government, through its agents, manages or controls property from which it receives a benefit or profit * * *.
> >
> > 'Another class of cases where this responsibility is recognized is where the Government is using or managing property through its agents under circumstances where these agents mingle on terms of equality with the general mass of citizens, and where the security of the citizens

requires that the same obligation shall rest upon them, and that it shall be enforced by similar responsibility, as in the case of private persons."

Page 1687.

"Mr. Walsh (*in supporting the bill*): * * * with respect to merchant ships we have said in the shipping act, and we can say by this bill, that the Government is operating vessels which it owns or controls as a business enterprise, and when the Government goes into that business enterprise it ought to go upon the same footing as a private individual or a private corporation, and it ought to be subject to the same liabilities for any act of Government officials in carrying out that particular business enterprise. In carrying on the operation of these ships we are operating them in commerce, in competition with privately owned vessels and ships, and we ought to be put upon the same footing as those others; * * *."

It appears both in the hearings and in the debates in Congress that it was the intention of Congress to impose upon the Government a new liability exactly the same as that of any private shipowner. This was plainly expressed in the original draft of the Act, and the subsequent drafts depart from the first draft only by attaining greater conciseness.

APPENDIX II.

(Form No. 18—Consular)

(January, 1917)

CERTIFICATE OF DISCHARGE OF SEAMAN

American Consular Service

.....
Place and date)

Name of ship, ...
Official number, ...
Port of registry, ...
Tonnage, ...
Description of voyage or employment, ...
.....
Name of seaman, ...
Place of birth, ...
Nationality .....Age.....years.
Character, ...
Ability, ...
Capacity, ...
Date of entry, ...Date of discharge.....
Place of shipment, ...
Place of discharge, ...
Cause of discharge, ...

I CERTIFY that the above particulars are correct, and that the above-named seaman was discharged accordingly.

....
Seaman. Master

Given to the above-named seaman in my presence the day and year above written.

.....
of the United States of America.

U. S. Government Printing Office, 1927 1-124

APPENDIX III.

Form No. 17—Consular

(Corrected May, 1910)

CERTIFICATE OF DISCHARGE OF SEAMEN, TO BE ATTACHED TO CREW LIST AND SHIPPING ARTICLES

American Consular Service

.....

(Place and date)

I, the undersigned, do hereby certify that the undernamed seamen have been duly discharged at this port from the .....of..... the master of the said vessel having deposited in this office the wages and extra wages as hereinafter set opposite their names, respectively, viz:

Date of Discharge.	*Name of Seaman.*	*Amount of Wages Collected.*	*Amount of Extra Wages Collected.*	*Co... Disc...*

Given under my hand and the seal of this office the day and year above written.

.....

of the United States of America.

NOTE:—Two copies to be issued, one to be attached to the Shipping Articles and the other to the Crew List Paragraph 209, Consular Regulations.)

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